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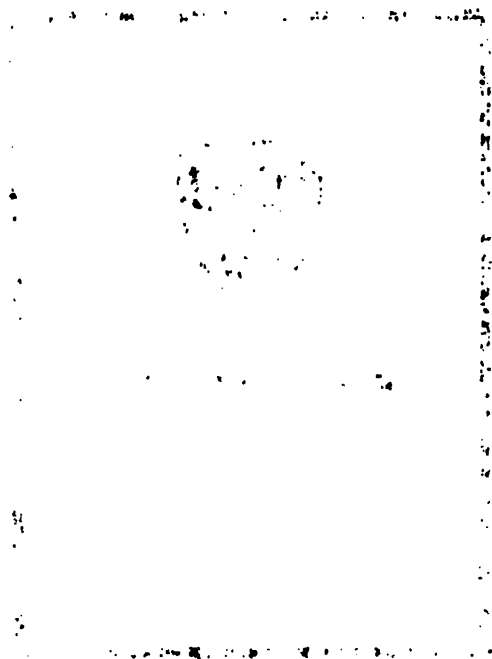
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REPORTS OF CASES

ARGUED AND ADJUDGED IN

THE SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,

FROM NOVEMBER 5, 1888, TO MARCH 24, 1890.

REPORTED BY

FRANKLIN H. MACKEY.

VOLUME XVIII.

(VII MACKEY.)

WASHINGTON, D. C.
THE LAW REPORTER PRINT, 503 E STREET.
1890.

Rec. Dec. 17, 1890.

OFFICERS
OF THE
Supreme Court of the District of Columbia,
DURING THE TIME OF THESE REPORTS.

Chief Justice:

Hon. EDWARD F. BINGHAM.

Associate Justices:

Hon. ALEXANDER B. HAGNER,
Hon. WALTER S. COX,
Hon. CHARLES P. JAMES,
Hon. WILLIAM M. MERRICK,*
Hon. MARTIN V. MONTGOMERY,
Hon. ANDREW C. BRADLEY.†

U. S. District Attorney:

JOHN B. HOGE.

Clerk:

RETURN J. MEIGS.

Auditor:

JAMES G. PAYNE.

U. S. Marshal:

ALBERT A. WILSON,† DANIEL M. RANSDELL.**

Register of Wills:

DORSEY CLAGETT.

* Died February 4, 1889.

† Appointed March 23, 1889.

‡ Term Expired.

** Appointed February 10, 1890.

AMENDMENTS
OF THE
RULES OF COURT.

RULE. 2.—*It is ordered:* That Rule 2 of the Rules of Practice of this Court be amended to read as follows:

RULE 2.—The Terms of the Court shall be held as follows:

Of the GENERAL TERM, on the

1st MONDAY OF JANUARY.

1st MONDAY OF APRIL.

1st MONDAY OF OCTOBER.

Of the CIRCUIT COURT on the

1st TUESDAY OF JANUARY.

1st TUESDAY OF APRIL, which term shall not continue beyond the second Saturday of July, except to finish a pending trial.

1st TUESDAY OF OCTOBER; and a special term on the first Tuesday of every month, except August, for entering judgments and rules in cases at Common Law.

Of the EQUITY COURT on the

1st TUESDAY OF EVERY MONTH EXCEPT AUGUST.

Of the DISTRICT COURT on the

1st MONDAY OF JANUARY.

1st MONDAY OF JULY.

Of the CRIMINAL COURT on the

1st TUESDAY OF JANUARY.

1st TUESDAY OF APRIL.

1st TUESDAY OF OCTOBER.

Promulgated Dec. 2, 1889, 6 M. G. T., 336.

RULE 117.—*Ordered:* That Rule 117 of the Common Law Rules, shall hereafter read as follows:

The Clerk shall not hereafter allow any original papers in any cause, at law or equity, to be taken out of his custody, except by the Auditor or by an Examiner of the Court. He may deliver such papers to the Auditor when the cause has been referred to him by the Court for a

VIII XVIII DISTRICT OF COLUMBIA REPORTS

report or account. When an Examiner has been required to take testimony in a cause, the Clerk may deliver to him upon application such papers filed therein as are required for use in taking such testimony. A receipt shall in all cases be taken by the Clerk in a book kept for the purpose, enumerating or sufficiently describing the papers so delivered by him to the Auditor or Examiner, and such papers shall be returned to the Clerk with all convenient speed. In no case shall the Auditor or Examiner allow any papers so delivered to him by the Clerk, or that may be filed before him as evidence during the examination, to be taken out of his office by any person, nor to be examined by others, except in the office of such Auditor or Examiner.

Promulgated May 12, 1890, 6 M. G. T., 413.

TABLE SHOWING THE VOLUMES CONSTITUTING
THE DISTRICT OF COLUMBIA REPORTS,
AND HOW THEY MAY BE CITED.

1	Cranch	may be cited as.....	1	Dist. Col.
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3	"	" "	3	" "
4	"	" "	4	" "
5*	"	" "	5	" "
6	District of Columbia	" "	6	" "
7	" "	" "	7	" "
1	Mac Arthur	" "	8	" "
2	"	" "	9	" "
3	"	" "	10	" "
	Mac Arthur & Mackey	" "	11	" "
1	Mackey	" "	12	" "
2	"	" "	13	" "
3	"	" "	14	" "
4	"	" "	15	" "
5	"	" "	16	" "
6	"	" "	17	" "
7	"	" "	18	" "

* There is a digest accompanying the five volumes of Cranch, which has been bound in uniform style with those volumes and erroneously entitled by the publisher "Cranch's Reports, Volume 6." It is not a volume of reports, and, of course, has never been cited as such. In arranging the above table I have taken no notice of it.

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REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

JOHN COX

VS.

CATHARINE COX ET AL.

1. A purchaser at a judicial sale has no right to question the regularity of the proceedings prior to a decree of sale.
2. But such a purchaser will not be required to take a doubtful title, however derived or acquired.
3. A title by adverse possession, when that possession has continued for such period as is required by the Statute of Limitations to bar an action, is as good a title as any.
4. Where a perfect title by more than forty years' adverse possession has been shown beyond a reasonable doubt the court will require the purchaser to comply with the terms of sale.

In Equity. No. 10,339. Decided November 5, 1888.
The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL by a purchaser at a judicial sale from an order requiring him to comply with the terms of sale.

THE FACTS are stated in the opinion.

Messrs. CARUSI and MILLER for purchaser.

It is true that a trustee appointed by a court of equity is the agent of the court to sell, and the sale made by him is a transaction between the court and the purchaser; and it may be claimed by the complainant and defendants that the doctrine of *caveat emptor* applies. Yet, if before payment

of money and notification of sale, the purchaser discovers a defect of title, at a proper time he may be relieved from his purchase by asking the court a rescission of the same. *Bolgiano vs. Cooke et al.*, 19 Md., 375; *Ridgely vs. McLaughlin*, 3 H. & McH., 221, 222; *Glenn Morton vs. Clapp*, 11 Gill, 10.

Again, it is well settled in equity, that a specific performance of a contract of purchase will not be decreed at the instance of vendor unless his ability to make a title is unquestionable.

If no incumbrance be communicated to the purchaser, or known to him to exist, *he* must suppose himself to purchase an unincumbered estate, and therefore his objection to taking it need not be confined to cases of *doubtful title*, but may even extend to encumbrances of any description, *which may* embarrass him in the full enjoyment of his purchase. *Garnett vs. Brooks*, 2 Call (Va.), 308.

Also a court of equity ought not compel a purchaser to take an estate which it cannot warrant to him. It has, therefore, become a settled rule that a purchaser should not be compelled to accept a doubtful title. *Craig vs. Shatto*, 9 Watts & Sergt., 83, 84.

Again, it is settled, a court of equity will not compel a purchaser *to take a doubtful title*, if there is such an uncertainty *about the title as to affect its marketable value*, and even though a court might consider it good, still the contract may not be specifically enforced. *Vreeland vs. Blimvelt*, 23 N. J. (Eq.), 485.

It is settled that "when parties enter upon land and take possession without title or claim or color of title, such occupation is subservient to the paramount title, not adverse to it." *Harvey vs. Tyler*, 2 Wall., 348, 349; *Society & Co. vs. Town of Powlett*, 4 Peters, 504.

Messrs. RALSTON and THOMAS for the trustees.

Admitting that error was committed by the equity court in the exercise of its jurisdiction, is the title of the

purchaser affected thereby? The title cannot be called in question by any collateral attack. *Thompson vs. Tolmie*, 2 Peters, 168. *Voorhees vs. Bank of the U. S.*, 10 Peters, 474.

A later and the leading case upon this subject in the United States Supreme Court is *Grignon's Lessee vs. Astor*, 2 Howard, 340, in which the court say:

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment nor evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Peters, 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of its jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law."

To like effect see *Ex parte Tobias Watkins*, 3 Peters, 193; *Gunn vs. Plant*, 94 U. S., 664; *Miller vs. U. S.*, 11 Wallace, 268; *Griffith vs. Bogert*, 18 Howard, 158; *Bolgiano vs. Cooke*, 19 Md., 375.

The purchaser at a chancery sale is not only not "bound" to notice any errors in the proceedings or testimony, but he can not escape from his purchase by relying upon them. *Bolgiano vs. Cooke*, 19 Md., 375.

Besides being insisted upon in many of the cases already referred to, the following-named cases decide that the rights of purchasers under sales made by the trustee will be

protected and the sales remain valid, though the decree be reversed. *Ward vs. Hollins*, 14 Md., 166; *Dorsey vs. Thompson*, 37 Md., 45; *Davis vs. Gaines*, 14 Otto, 391.

The second objection insisted upon by the purchaser to the completion of his purchase is that the title offered by the trustees is one obtained by adverse possession, and not of such nature as he may be required to accept. Such a title is, in the eyes of the law, as good as any other title.

An adverse possession for the statutory period vests in the possessor an absolute fee-simple title, equally available either for attack or defense with a valid fee-simple title otherwise acquired. *Harpening vs. Dutch Church*, 16 Peters, 455; *Leffingwell vs. Warren*, 2 Black, 599; *Bicknell vs. Comstock*, 113 U. S., 149, and cases there cited.

In the present case John H. Eaton obtained title by sale under execution, in 1821, against Wm. O'Neal, O'Neal at that time possessing a title free from outstanding trusts. Such a sale conveyed title to Eaton, though no deed was made till 1854. See *Remington vs. Linthicum*, 14 Peters, 92.

The title of the purchasers under tax sale was complete by adverse possession against John H. Eaton by the time of his death in 1856. Eaton's successor in title, his wife, was *sui juris*, and there was nothing to extend the running of the statute against either the Eatons or the heirs of William O'Neal.

A purchaser will in equity be compelled to take a title shown to be perfect by adverse possession. *Daniell's Chancery Pleading and Practice*, 989, note 3; *Scott vs. Nixon*, 3 Drury & Warren, 401, 404, 408; *Shriver vs. Shriver*, 86 N. Y., 575; *Seymour vs. DeLancey*, 1 Hopkins, 436; *Shober vs. Dalton*, 6 Phila., 185; *Pratt vs. Eby*, 67 Pa. St., 376.

The right to use affidavits or depositions in attempts to enforce specific performance in supporting a claim of adverse possession is fully recognized in many of the above cited cases. In *Scott vs. Nixon* (*supra*) two affidavits were

received by Lord Chancellor Sugden as satisfactory evidence of adverse possession. Similar procedure met with the approbation of Justice Folger and the Court of Appeals of New York in *Shriver vs. Shriver* (*supra*). A like course was allowed in *Seymour vs. De Lancey*.

The objection that the creditors of William Cox may assert claims against the real estate is without force. The proceeds of the sale will be in the hands of the officers of the court, subject to any order which the court may pass. The personal estate is insufficient to pay the debts of William Cox. Where a partition is sought among the heirs, or where a deceased debtor's real estate has been decreed to be sold in any other manner than by a creditor's bill, any creditor of such deceased person may be permitted to come in by petition, and have his claim allowed and paid out of the whole or the surplus of the proceeds of the realty of the deceased so far as they will go, considering the surplus as a residuum of the real assets which had been taken from the hands of the heirs, and the trustees may give such notice as was adopted in this case to the creditors to bring in their claims. *Fenwick vs. Laughlin*, 1 Bland, 474; *Gaithers vs. Welch*, 3 G. & J., 259; *Griffith vs. Parks*, 32 Md., 5.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

This was a suit on behalf of John Cox, an infant, by his next friend, Seignelay C. Elliott, against the defendants (all of whom are infants except Catharine Cox, the widow, and Patrick Cox, administrator of the estate of William Cox, deceased), for the partition or sale of lot 116, in subdivision of part of square No. 510, of which it is alleged the said William Cox died seized.

The bill alleges that "it will be to the interest and advantage, &c., to have partition made, or in case that cannot be had, that the same may be sold."

The infants, by their guardian *ad litem*, filed their

answers in the usual form—that, being infants, they submit their rights to the court.

The defendant, Catharine Cox, substantially admits all the allegations of the bill.

The administrator admits the allegations of the bill and states the amount of the debts against the estate to be \$1,424.48 on the 27th of April, 1887; that the amount realized from sale of personal estate was \$399.59, and that he consents to a sale of the real estate, and asks that before distribution of the proceeds of sale he be paid so much as may be necessary to pay debts.

Replications were filed to the answer of Mrs. Cox, also to the answers of the infants and the administrator.

Some testimony was taken in relation to the propriety of partition, or as to whether the premises were divisible without injury and as to the value of the premises. Upon the hearing the court decreed a sale of the property, and the trustees advertised the property, and on the 8th day of June, 1887, sold it to one Owen Shugrue, for the sum of \$4,425.

The appellant, Shugrue, refused to comply with the terms of sale, and upon a rule issued on the 23d of July, 1887, to show cause why he did not comply, he, on the 29th of July, 1887, filed his answer setting forth his reasons for not complying, which were substantially as follows:

1. That there was error because the decree for sale was granted without proof being adduced of certain allegations contained in the bill.

We think it is well settled by the authorities that a purchaser at a judicial sale has no right to question the regularity of the proceedings had before the decree of sale was entered upon which the purchase was made. He is not a party to the action, and has no right to appeal nor to prosecute error for any irregularity in the proceedings prior to the decree of sale. He is only brought in connection with the case by his purchase in a collateral way.

This objection is not well taken.

The second objection is that, inasmuch as the title offered to be conveyed by the trustees is simply one of adverse possession, it is not such as the purchaser will be compelled by the court to take.

There can be no question but the title by adverse possession, when that possession was continued for such period as is required by our Statute of Limitations to bar an action, is as good a title as any. It is a fee-simple title, and is as effective as any otherwise acquired.

It is, however, a rule of law that a purchaser will not be compelled to take a doubtful title, however derived or acquired, and the only question here is whether the evidence in the case is such as establishes with certainty title by adverse possession in these parties and their predecessors in possession of the premises.

We have carefully examined the evidence and, without stopping to recite or discuss it, are convinced that it shows title for more than forty years in the parties who are represented by the parties in this case. A perfect title having been shown beyond reasonable doubt in these parties, the purchaser by taking a deed will acquire a good title to the premises.

The order of the court below will be affirmed.

THE UNITED STATES

vs.

MARTIN F. MORRIS ET AL.

1. The acts of Congress of August 2, 1882, and 5, 1886, directing the Attorney-General to institute a suit in this court, "in the nature of a bill in equity," for the purpose of establishing the title of the United States to the Potomac River flats, and fixing a time within which all persons claiming an interest therein should answer, are to be construed as meaning that the proceedings in such suit are to be according to the usual course in courts of equity.
2. In accordance with such course, the justice presiding is invested with a discretion upon proper showing to permit a party at any time before final hearing to amend a pleading or to file a supplemental pleading if facts have arisen since the filing of the original pleading.
3. Since the intention of Congress in directing this proceeding was to completely quiet the title of the United States to the lands in question, the court upon an application to file a supplemental answer will not scrutinize the character of the claim proposed to be set up, but will defer that to final hearing on the merits.

In Equity. No. 10,306. Decided November 5, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from an order of the special term overruling a motion by Henry M. Marshall and others, defendants, for leave to file supplemental answers.

THE FACTS are stated in the opinion.

Mr. R. B. LEWIS, for appellant.

Mr. HUGH T. TAGGART, *contra*.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

This case comes before us again on the appeal of the defendants, Henry M. Marshall and others, from the orders passed at the Special Term, June 26, 1888, and July 31, 1888, overruling motions of said defendants for leave to file supplemental and amended answers in said cause.

By the act of Congress, approved August 2, 1882, chapter 375, which made an appropriation for "improving the

Potomac River in the vicinity of Washington with reference to the improvement of navigation, the establishment of harbor lines, and the raising of the flats, under the direction of the Secretary of War," authority was given the Attorney-General to cause a suit or suits in law or in equity to be instituted in the name of the United States, in the Supreme Court of the District of Columbia, against any and all claimants of title under any patent, which, in his opinion, was by mistake or was improperly or illegally issued for any part of the marshes or flats within the limits of the proposed improvements.

By another and further act entitled "An act to protect the interests of the United States in the Potomac River flats in the District of Columbia," approved August 5, 1886, it was made the duty of the Attorney-General to institute in the same court "a suit against all persons and corporations who may have or pretend to have any right, title, claim, or interest in any part of the land or water in the District of Columbia, within the limits of the city of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac River and composing any part of the land or water affected by the improvements of the Potomac River or its flats, in charge of the Secretary of War, for the purposes of establishing and making clear the right of the United States thereto."

This last act provided that the suit "shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations known to set up or assert any claim or right to or in the land or water in the said first section mentioned and against all other persons and corporations who may claim to have any such right and interest." It is also provided that process should issue according to the regular course of this court; that publication should be made in the newspapers in Washington for a stated time, "citing all persons and corporations interested in the subject-matter of said suit or land or

water in this act mentioned to appear at a day named in such motion in said court to answer said bill and set forth and maintain any right, title, interest, or claim that any person or corporation may have in the premises; and the court may order such further notice as it shall think fit to any party in interest."

The present appellants in this case were specifically made parties to the bill filed by the Attorney-General as persons pretending to have some title and interest to and in the land and water referred to. The bill alleges that "the complainant is not sufficiently informed as to the nature and extent of said claims to set them out with particularity, and the complainant leaves them to present their claims and answers hereto as they may be advised."

The order of publication provided for in the act was made in this suit. The appellants filed their answer January 5, 1887, setting forth a claim to the whole of the Potomac River, by virtue of mesne conveyances deriving title from the grants of King Charles II and King James II of a tract of land in America known as Northern Neck of Virginia, and upon this answer issue was joined.

In Special Term they asked to be allowed to file amended or supplemental answers, in which, in brief, they set forth that since the commencement of this action they have obtained a release from the present owner of the title by regular succession from Lord Baltimore under the patent issued to him as lord proprietor of Maryland, and asserting that, while they still rely upon and affirm the title set forth in the original answer as good and indefeasible, yet for the purpose of bringing in that which is a cloud upon their title, a claim to this land asserted on the part of the party claiming to be the owners of the patent issued to Lord Baltimore, and of certain rights and interest under that patent, they have obtained a release of that claim; and because of the fact that there has been much dispute between these two titles, both in the judicial and political departments of

the Government, they ask now that they may be permitted to set forth this title and claim of ownership of which they have become possessed.

It is objected by the United States, first, that inasmuch as the Act of 1886 fixed a time within which all persons asserting a claim were to answer the bill, by implication those who did not answer within that time were estopped from asserting any claim, and that to permit the appellants to file this supplemental answer is equivalent to permitting them to file at this stage of the case an original answer.

We do not understand from our examination of the act of Congress, it was the intention of Congress to absolutely deny the right of any party to come in after the day named in the original notice. We rather understand the reverse, that the proceedings are to be according to the usual course in courts of equity, and in accordance with such course the justice presiding is invested with a discretion, upon proper showing, to permit a party at any time before final hearing to amend a pleading or to file a supplemental pleading, if facts have arisen justifying it since the filing of the original pleading. That is according to the usual course in equity, and we think it was the intention that the proceedings in this suit should be conducted in that way, and hence that the court below was invested with a discretion, if the showing and reason for filing the supplemental answer was sufficient to authorize it to be done.

The second objection of the United States to the filing of this answer is that, though the court will ordinarily allow amended and supplemental answers to be filed, in order to perfect the pleadings in a suit in chancery or to set up new matter not in the original answer, yet the amended and supplemental answer should not be allowed to be filed because of the passage of certain confiscation acts of Maryland which are not set up in this bill. In other words, the United States really claims that, looking to the history of the State of Maryland, there are well-known facts of which

the court will take notice, which show, as it is claimed, that the title and all rights growing out of the issuance of this patent to Lord Baltimore are now in the Government of the United States; that in the revolutionary war, by reason of certain confiscation acts by the legislature of Maryland, these proprietary rights were all forfeited to the State of Maryland, and have been and were in the State of Maryland up to the date of the act of cession, whereby all the rights of Maryland passed to the United States Government and have been there ever since.

This raises a question of great importance as between those who claim to represent by inheritance or devise the interest in the patents issued to Lord Baltimore and the Government, and we think, upon the whole, looking to the spirit and intent of this act, that all persons claiming any interest in the land and water or any title of any description in the land and water should appear and answer and set forth their claim and title; that thereupon it should be adjudged whether or not they had any such interest or title, and if any, it should be ascertained of what value their interest or claim is, in order that it may be reported to the Congress of the United States; that the object of Congress in making this provision must have been to completely quiet the title of the United States in this land and water, and that all claims of every nature should be presented and adjudicated, so that thereafter there shall be no annoyance either by suits in court or by applications to Congress for any allowance by reason of the rights or interests claimed to have been taken and used by the United States, in the making of this improvement, without compensation. We believe, such being the object and purpose of the act of Congress, it is better that we should permit the supplemental answer to be filed, and that the parties interested should have a hearing in a proper way upon the merits. It is presumed that the last supplemental answer offered will be the one that the parties desire to have filed.

Upon full consideration of the matter we have decided to reverse the order of the Special Term overruling the motion of the defendants who are appellants in this matter for leave to file the answer.

In thus deciding it is proper to say that we do not intend to pass upon the merits of the defense set forth in these supplemental answers, leaving the whole matter to be determined upon the merits as the court may be advised upon issues as hereafter made.

THE UNITED STATES *ex rel.* ANTHONY POLLOK*vs.*

BENTON J. HALL, COMMISSIONER OF PATENTS.

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1. Whenever a reasonable suggestion of its necessity for the purposes of evidence is made by the person requesting it, the Commissioner of Patents cannot lawfully refuse to furnish a certified copy of an abandoned or rejected application for a patent; the right to be furnished such a copy is given the public by statute, and the refusal thereof entitles the applicant to the writ of mandamus against the Commissioner to compel a compliance with such request.
 2. An attorney at law who has requested such a copy in behalf of his client and been refused has such an interest in the subject-matter as entitles him to commence proceedings in his own name as relator for the writ of mandamus.

At Law. No. 29,068. Decided November 12, 1888.

The CHIEF JUSTICE and Justices COX and MERRICK sitting.

PETITION for mandamus against the Commissioner of Patents. Hearing in the first instance.

THE FACTS are stated in the opinion.

Mr. PHILLIP MAURO for relator.

Mr. L. A. PALMER for the Commissioner.

Mr. Justice MERRICK delivered the opinion of the Court:

The court has had under consideration the application of Anthony Pollok for a writ of mandamus against the Commissioner of Patents to compel him to give a certified copy of a certain abandoned application for a patent remaining on file in the archives of that office.

In response to that application, the Commissioner sets up that, while he considers that the relator is an attorney in the regular practice of his profession before the Patent Office, and that he is also in point of fact the attorney employed by the party in whose behalf he makes the application for the copy in question, he has no right to it:

First. Because he is not the party having the legal title to the subject-matter;

Second. That it does not appear that the paper is really requisite for the purposes of evidence in the alleged cause; and

Third. That under Rule 179 of the Patent Office the Commissioner of Patents has a discretion to grant or withhold information in that class of cases at his pleasure, or at his discretion—the terms as used, seem to be convertible.

In order to ascertain if there were just foundation for the refusal of the Commissioner of Patents, as well as to understand the scope of that refusal, it is proper for a moment to advert to first principles. For what was the Patent Office established? What was the design of its institution? And what rights does it protect? We know that at common law there was no such thing as a monopoly in an invention, or a monopoly in the use of knowledge which the party possessing it had once communicated in any manner to his fellow beings; that the revelations of thought and intellect are common property, and there is no monopoly or exclusive right in such things, except so far as they have been conferred by positive law; and positive law has never gone any further to confer exclusive property in such things than for purposes of encouragement of science, and the development and advancement of art. That it may not be supposed that the court is for the first time announcing this as a general principle of the common law, though it is familiar to all lawyers, we refer to the language of the Supreme Court in the case of *Gayler vs. Wilder*, 10 Howard, 495, and read a certain passage from that opinion:

“ Now, the monopoly granted to the patentee is for one entire thing; it is the exclusive right of making, using, and vending to others to be used, the improvement he has invented and for which the patent is granted. The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated

by the rules of the common law. It is created by the act of Congress, and no rights can be acquired in it unless authorized by statute and in the manner the statute prescribes."

The authority for legislation on the subject is found in that clause of the Constitution which says: "The Congress shall have power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Here we find the entire scope of the right of exclusiveness; and as involved in the right of exclusiveness the entire scope of the right of secrecy. In pursuance of the above delegation of power, Congress has established the Patent Office, and has established certain rules and regulations with respect to it, and amongst those rules the only rule of secrecy is that which is made in aid of the inventor, who has not yet perfected his design, and which enables him to present an application to the proper authorities to secure his invention, and while he is using all diligence to confer upon the public the knowledge that he possesses, it gives him further opportunities to perfect his invention before he makes an application for a definitive patent. That limitation of the authority of publicity, that single grant of secrecy, is to be found in Section 4902 of the Revised Statutes, in these words:

"Any citizen of the United States who makes any new invention or discovery and desires further time to mature the same, may, on payment of the fees required by law, file in the Patent Office a caveat setting forth the design thereof and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application is made within the year by any other person

for a patent with which said caveat would, in any manner, interfere, the Commissioner shall deposit the description, specifications, drawings, and model of such application, in like manner, in the confidential archives of the office and give notice thereof, &c."

That is the only qualification in regard to publicity which runs through the entire patent law, because you will find, not only from the general principles that have been spoken of, but also from the provisions of various sections of the patent law, that there is an obligation on the part of the officers of the Patent Office to make known, and to disseminate before the public the knowledge of all inventions. They are required by divers sections to publish from time to time and have printed, and that, too—under seal so that they may be evidence in courts of justice—volumes containing the specifications, descriptions and drawings of all patents that have been issued under the authority of the United States. See Secs. 490, 491, R. S. U. S.

Besides being required to make these public communications of knowledge for the benefit of mankind, to promote the progress of science and the useful arts, there is a section, 493, which makes it incumbent upon the Commissioner of Patents to give specific information, by uncertified copies, which goes on to say:

"The price to be paid for uncertified printed copies of specifications and drawings of patents shall be determined by the Commissioner of Patents, within the limits of ten cents as the minimum and fifty cents as the maximum price."

So that by this section of the law it is the right of any and every man to obtain an uncertified copy of specifications and drawings on file in the Patent Office at the minimum price to be fixed by law.

Besides that, and besides the general provision in regard to published copies of the proceedings in the Patent Office

under seal, there is another provision in Section 892 for certified copies in particular classes of cases:

"Written or printed copies of any records, books, papers or drawings belonging to the Patent Office, and of letters patent, authenticated by the seal and certified by the Commissioner or Acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof."

Now, the Commissioner of Patents, in his response to the present application of the relator, seeks to withdraw this case from the ordinary requirements of publicity and bring it within the special requirements of secrecy under Section 4894, which is in these words:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

In connection with that clause of the statute they have promulgated a rule in the Patent Office, Rule 179, which is as follows:

"Copies of the files of rejected and abandoned applications may be furnished when ordered by the Commissioner. The requests for such copies must be presented in the form of a petition properly verified as to all matters not appearing of record in the Patent Office."

It is upon the construction of that rule, as compared with the clause of the statute that I have read, that the Commissioner seeks to maintain that he has a discretionary power to grant or refuse an application. Why? Is there anything in the law which I have read about the duration of

time when an application may remain without abandonment that justifies the supposition that the right of secrecy shall attach to an application of that sort after it has laid in the office during all the period provided by law? The statute expressly says that after it has laid in the office the period provided by law (*viz.*, two years) as an unperfected application, it shall be considered as abandoned unless there be good cause of delay shown, which is not in this case.

What is abandonment? The definition is given in the case which I have already quoted by one of the judges in part of one of the opinions there, that abandonment is a dedication to the public—that is to say, that the party has withdrawn himself from the claim of monopoly and exclusive use which he might have had for his invention, and notwithstanding whatever it may be worth, it thenceforth belongs to the public—it is abandoned to the public.

Now, when a thing has been dedicated to the use of the public—taken out of the special provisions contemplated in the monopoly in favor of an individual in derogation of the principles of the common law—the question arises, Can the Commissioner of Patents assume a discretionary power to keep that in secret which belongs to the public—that which the inventor thought out, under the revelation of the Divine mind, and which has been consecrated to the use of mankind? It cannot be. And while the Commissioner of Patents has the right to make all just rules and regulations for the administration of his office, he has no right to make a rule which derogates from common right and deprives mankind of that which belongs to it as common property.

Then, according to the construction which has been indicated as flowing from these statutes, an application once made and filed in the Patent Office belongs to the whole public, and, according to the scheme of the patent law, everything placed in the Patent Office (completed or incompletd) belongs to the public, subject to the qualification

of the individual rights of the applicant and patentee. Then has not every man a right in common to the benefit of that knowledge which is thus dedicated to the public?

It was urged in the argument that the Commissioner had a right to hold abandoned applications as part of the secret and confidential archives by reason of a decision of the Supreme Court in *Brown vs. Guild*, 23 Wallace, 181. All that the Supreme Court decided in that case as to abandoned applications was that an abandoned application stood upon the same level with an abandoned experiment, and did not constitute a bar, within the terms of the patent law, to the grant of a patent to a subsequent discoverer. They say in that case that "a mere application for a patent is not mentioned [in the Statutes] as a bar. It can only have a bearing on the question of prior invention or discovery. If upon the whole of the evidence it appears that the alleged prior invention or discovery was only an experiment and was never *perfected*, or brought into actual use, but was abandoned and never revived by the alleged inventor, the *mere* fact of having unsuccessfully applied for a patent therefore can not take the case out of the category of unsuccessful experiments." But there is nothing in that decision which detracts from the right of the public to the knowledge which the applicant has by his abandonment placed at the disposal of the public. On the contrary, the court recognizes distinctly that such application may have a bearing upon the question of prior invention. If, then, it be, in the opinion of the Supreme Court, a proper element of evidence when the question of prior invention or discovery arises, it must follow that the Commissioner of Patents cannot withhold the necessary information to be derived from the record of such application whenever it may reasonably be demanded for the purposes of evidence, as in the controversy now before us.

The only question that remains is whether an applicant for information thus withheld is entitled to the compulsory

process of a court of justice to require the disclosure of that knowledge and possession of the proper evidences of that knowledge.

The writ of mandamus, being a prerogative writ, as it is called—one not to be granted upon light considerations—is yet a writ which belongs to every citizen where the law gives him no other remedy, and where it appears that he has a right which has been obstructed. To put a familiar case, before going on with the one under consideration: Suppose an attorney at law, in the progress of his professional business and avocation, has occasion to go the office of the Recorder of Deeds for the purpose of investigating a title, or of gaining knowledge in respect to a title there of record, and the Recorder of Deeds refuses him permission to examine the records: Is it not clear that he is entitled to the benefit of the writ of mandamus for that purpose? Is not the right of the client, and is not also the right of the attorney at law employed by the client in the ordinary pursuit of his profession, violated so as to give him a substantial position in a court of justice to demand redress for the wrong which has been committed upon him?

Now, how does that case differ in substance from the application which has been made in this particular case? The relator sets forth that he is an attorney at law in the pursuit of his profession; that he has constant occasion to inspect and examine the records which are on file within the office of the Commissioner of Patents; that in this particular case he has been delegated by his client to obtain information in this particular case requisite for the purpose of a suit now pending between his client and the party interested or supposed to be interested in this application in the courts of France. Is it necessary under such circumstances that the client himself should apply for the writ of mandamus? It was argued here that no one except the person that had title to the property could make an application for a mandamus; that an attorney, as such, could

not make the application for the writ. But the rights that have been spoken of which appertain to the attorney, *qua* attorney, and appertain to him individually, irrespective of anybody else, shows that he has a property of a sort in this case which a court of justice will protect, and that it is very different from the case which was relied upon in argument, where an attorney seeks a mandamus to compel an officer to issue a patent to a party for some subject-matter in which the party alone is interested. The attorney has no interest in the title to the property, and therefore cannot in the case supposed apply for and compel the issue of the mandamus, because he has no specific interest in the subject of the title. But in this case the attorney has specific interest, not in any distinctive title, but in a matter of property common to himself and all mankind, and in regard to which he has also, to a certain extent, what may be called a peculiar special property; the interest devolved upon him by his avocation of attorney in the proper prosecution of his professional rights and professional duties.

It seems, therefore, that the objection which is made by the Commissioner of Patents, upon the ground that the relator is not a party in interest having title to the property, does not avail when we consider the character and object of the application.

The Commissioner makes another objection, which is, that it does not appear to his satisfaction that the purpose for which it is wanted (*viz.*, to be used in evidence in a case), is substantial, because he does not see how the matter is to become evidence.

Now, the court is of opinion that he is not placed in his position for any such purpose, and that it is sufficient that a reasonable suggestion of necessity for the use of a document for evidence be made in order to set in motion his duty to furnish the copy. He is not there to sit as a judge in the controverted cause. If the suggestion be made by

a reasonable person and under reasonable conditions, that suggestion should be conclusive upon him so far as the efficacy of the paper for the purposes of evidence is to be an element in the application, for a copy for the purposes of evidence, under the clause of the statute which has been read.

But in this case it should have been evident to the Commissioner of Patents that it was his manifest duty to give the copy for two reasons: It appears upon the face of the application, not only that it is wanted for the purposes of evidence, but that in point of fact, properly considered, the paper which is in question and which he denies access to belongs to the public and is properly part and parcel of the patent with reference to the litigation about which the document has been wanted for purposes of evidence, for the reason that that rejected application and the descriptions of the matter contained in that rejected application are made, by reference, part of the very specification of the patent in question; and, therefore, it was his duty, independent of the general requirement of furnishing a copy for the purposes of evidence, to have given that copy as part and parcel of the published patents and published specifications of the patent in question. Being incorporated into it by reference, it is in contemplation of law part and parcel of the specification of the patent, which patent, with its specifications, by the general provisions of law, it is incumbent upon the Commissioner of Patents to publish to the world in the various modes which have been indicated, under the rules of the Patent Office which have been read. It will appear in the 75th paragraph of the specifications of Patent No. 279,717, which is the patent of the party in question, that he does incorporate this rejected application in these words:

“While the sides of the counter-stiffeners will be pressed inward by the action of the mold J, to form what I term a ‘reshaped unflanged counter,’ substantially as shown and described by me in another application of even date herewith.”

Which application "of even date herewith" is the rejected application which he now refuses to permit anybody to have access to. Of course, any lawyer, reading that specification and seeing that it referred to the rejected application for the purpose of part of its description, and as a more full and complete identification of its subject-matter, and of the manner in which the subject-matter acts, will see that that rejected application is by contemplation of law a parcel of the specification, and, therefore, that the whole public is entitled to have what is in that rejected application, in order to comprehend the nature of the specification in the patent which has been published; but the Commissioner of Patents (or, rather, we should say, in justification of the Commissioner of Patents personally, some subordinate in his office, because he has so many large duties that all these things have to be confided to subordinates, and, consequently, although the return is under his name it is probably at second hand), notwithstanding the quotations that have been made, in his return undertakes to justify his refusal by a part of his return in which he says that he had referred the application to a subordinate, with this result: That his refusal to order such copy to be furnished to the relator was in the following words:

"*Examiner*: Please report below, without delay, whether the abandoned application referred to in the letter attached contains any invention or matter not covered by patent No. 279,717.

"BENTON J. HALL."

"Respectfully returned, with remark that upon careful examination I am unable to find any legitimate connection between the Patent No. 279,717 and the abandoned application referred to. The patent covers a machine for the manufacture of counter-stiffeners, without reference to the special configuration. The abandoned application describes as the alleged invention a counter-stiffener of definite construction, and incidentally states that it may be made

by a method claimed in the patent, and may also be made by other methods. The patent and abandoned application stand clearly independent of each other.

"J. P. CHAPMAN,
" *Examiner Div. 11.*"

And then follows the rest of the communication:

"The within request is denied, for the reason that the showing is insufficient wherein the abandoned application is material and important as evidence, and for the further reason that the Commissioner is advised by the Examiner that there is no legitimate connection between the Patent No. 279,717 and the abandoned application referred to.

"BENTON J. HALL,
" *Commissioner.*"

It seems, then, to have been on the above mistaken considerations that the Commissioner refused the application of the relator.

Without going any farther into the matter, it must be apparent, from the review that has been given, that the Commissioner is without legal ground of objection to the demand which has been made by the relator in the particular case; not only the general considerations referred to, but for the special reason deduced from the identity of the document itself, as one of the documents belonging to the public as parcel of patent and specification No. 279,717, and that the Commissioner should not have denied the application. And if the Commissioner had followed up the rules of his office, to which he refers, with a just appreciation of the relation between those two documents, the one to the other, he would have been enabled to escape from the error into which he was led by inadvertence in this particular instance. Amongst other things, in his return, he relies upon Rule 15, which is in these words:

"Caveats and pending applications are preserved in secrecy. No information will be given, without authority, respecting the filing by any particular person of a caveat

or of an application for a patent or for the re-issue of a patent, the pendency of any particular case before the office, or the subject-matter of any particular application, unless it shall be necessary to the proper conduct of business before the office, as provided by Rules 97, 103, and 108."

Now, if he had been enlightened as to the true nature of this application and the inter-dependence between these two documents, he would have found the following in the very next rule:

"16. After a patent has issued, the model, specification, drawings, and all documents relating to the case are subject to general inspection, and copies, except of the model, will be furnished at the rates specified in Rule 218."

There was, therefore, his own Rule 16, which shows that it was imperative upon him, under circumstances such as have been indicated, appertaining to this particular document and its relation to an existing patent, to have granted the application which he has refused. All this was, doubtless, from inadvertence upon the part of the Commissioner of Patents, and it is only justice to the Commissioner that the court should say that he is not personally to have imputed to him any fault or misconduct, although, of course, he is held legally responsible for the acts of his subordinates.

For these reasons, without enlarging further upon the matter, the court is of the opinion that the relator is entitled to the writ prayed for.

JOSEPH J. REYNOLDS

vs.

FRANCIS H. SMITH ET AL.

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1. By Equity Rule 82 an attachment and garnishment may issue upon a money decree of this court.
 2. That rule is valid, and was passed under the authority of section 770 of the Revised Statutes relating to the District.
 3. While a court cannot vest itself with jurisdiction by its rules, yet it may regulate its process, for that is a matter of practice.
 4. A writ of attachment intended to be had against the Columbia National Bank of Washington City was returned by the Marshal indorsed "Attached credits in the hands of the Columbia National Bank by service on E. J. Parker, cashier." The bank thereupon appeared and answered. On a motion by the judgment-debtor to quash the writ it was *Held*, that the absence in the return of the words "of Washington City" was immaterial.
 5. Where funds are deposited in bank in the name and to the credit of the judgment-debtor he will not, when they are attached, be allowed to set up as a defense to the attachment that he only holds such funds as agent or trustee; such a defense can only be made by the intervention in the cause of the principle or *cestui que trust*.

In Equity. No. 8989. Decided November 19, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from an order overruling a motion to quash an attachment issued upon a money decree.

THE FACTS are sufficiently stated in the opinion.

Messrs. WATSON J. NEWTON and FLEMING J. LAVENDER for appellants (defendants).

It is submitted that the judgment of condemnation was erroneous for the following reasons:

First. That the court had no jurisdiction to issue the writ in this case.

The writ of attachment was issued under the 82d equity rule.

This rule was made by this court, it is assumed, by virtue of the authority conferred under the act of Congress, of March 3d, 1863. Sec. 870, R. S. D. C.

By Section 760, R. S. D. C., this Supreme Court possesses the same powers and exercises the same jurisdiction as the circuit courts of the United States. And by Section 92, R. S. D. C., the laws of the State of Maryland, not inconsistent with the title of the act as the same existed on the 27th day of February, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District.

These two sections are to be read together. (See *U. S. vs. Schurz*, 102 U. S., 393). From these restrictions it is evident that this court possesses the same powers and jurisdiction as the circuit courts of the United States, and in addition thereto the common law jurisdiction as derived from, *and as limited by*, the laws of the State of Maryland as they existed at the time of cession, except as since modified or repealed by Congress or by authority thereof.

"Section 917, R. S. U. S., provides that the Supreme Court of the United States shall have power to prescribe from time to time, *and in any manner not inconsistent with any law of the United States*, the forms of writs and other process, the modes of framing and filing proceedings and pleading, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up and enrolling decrees, and of proceedings before trustees appointed by the court; and generally to regulate the whole practice to be used in suits in equity or admiralty, by the circuit and district courts."

By Sec. 918, the several circuit and district courts may, from time to time, and in any manner *not inconsistent with any law of the United States*, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the *returning* of writs and processes, and otherwise *regulate* their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

From the foregoing, it appears that, while both the

Supreme and circuit courts have the power to make rules of court to regulate their own practice, yet, neither have the power to make any rule inconsistent with any law of the United States, and the circuit courts cannot make a rule inconsistent with a law of the United States, nor with a rule of the Supreme Court of the United States. It follows, then, that the Supreme Court of the District of Columbia, having no more power in this regard than the circuit courts, cannot make a rule of court inconsistent with any law of the United States, or with a rule of the Supreme Court of the United States, or with the laws of Maryland *as adopted by act of Congress* at the time of the cession.

It is submitted that the power to issue an attachment instead of an execution on a decree in equity is not obtained from any rule of practice for the circuit courts sitting as courts of equity. (See Rule 8, Mitford & Tyler, 689.) It is further submitted that this court has no power to issue such an attachment under the laws of Maryland. On the contrary, Equity Rule 82 is inconsistent with the laws of Maryland *as adopted by Congress* at the time of the cession.

It is unnecessary to enter at large upon the old method of *enforcing the decree of a court of equity*, as by a reference to page 199, of Alexander's Chancery Practice, it will be seen that a new remedy was provided for the State of Maryland by the Act of 1785, Ch. 72, Sec. 25.

Nothing is said in that act about an attachment on judgment or decree.

In fact, the act of assembly (Act of 1715, Ch. 40, Sec. 7) which gives the process of a judicial attachment, applies only to courts of common law. See *Watkins vs. Dorsett*, 1 Bland, 535.

The construction thus given in 1829 by the chancery court must certainly have been the law of Maryland, for the legislature in 1831 supplemented the Act of 1785, Ch. 72, Sec. 25, by conferring the requisite power to issue attach-

ments to be laid upon debts due the defendant, upon judgment and decrees.

But further than this, it will appear that the only power to issue attachments in this court, either at law or in equity, is the Act of 1715, Ch. 40, Sec. 7, and this power is not only limited to an attachment on judgment on the law side of this court, but is also limited to cases in which the defendant is a non-resident or absentee. And the defendants in this case were not absent from this jurisdiction at the time of the issuance of this writ. See Evans' Prac., 59.

Attachments by this act are divided into attachments on judgment and on warrant; attachments on general judgments being grounded on the Act of 1715, Ch. 40, Sec. 7. That this act applies only to absent defendants, is evident from the language of the statute, its scope and object.

An attachment is not the ordinary process by which to arrive at the fruits of a judgment, and will only lie when specially authorized as by Act of 1715, Ch. 40, Sec. 7, from the court in which the judgment was rendered against the goods, chattels, and credits of the absent defendant. *Harden et al. vs. Moores*, 7 H. & J., 11; *Davidson vs. Beatty*, 3 H. & McH.

The decision in the last-mentioned case was rendered in 1797. It was the law of Maryland at the time of the cession, and it has never been modified or repealed by act of Congress, or overruled by this or the old Circuit Court, and it is the law to-day. But in order to avoid all doubt as to the construction of the 7th section of the Act of 1715, we have but to turn over a few pages of the Laws of Maryland to find the legislature enacting "That the provisions of the seventh section of the act, to which this is a supplement, be, and the same are hereby declared to *extend to cases where the defendant or defendants shall be residents* of this State at the time of issuing the attachment in said section provided for, or at any time afterwards." See Dorsey's Laws of Maryland, Vol. 2, 1067. This is the recogni-

tion by the Maryland Legislature in 1831 of the judicial construction placed upon the old Act of 1715, Ch. 40, by the court in 1797, showing that up to 1831 that decision was considered as laying down the law, and so well settled was it that it required an act of the legislature to remedy this defect.

Can it be contended that Equity Rule 82, under which the writ was issued in this case, is consistent with the laws of Maryland as adopted by Congress, and which, so far as adopted, are laws of the United States in this jurisdiction?

Second. The attachment should have been quashed in the court below, because the fund in the bank was never attached or the bank served as garnishee. On his return, reading as follows:

"Attached credits in the hands of the Columbia National Bank by service on E. Southard Parker, cashier, and served him with copies of this writ, rule of court, and interrogatories as garnishee of defendants."

The attachment must be served upon a creditor. The bank in this case is the creditor.

The cashier of a bank is not liable as garnishee of the deposit by the debtor, for the cashier is not the debtor of the depositors. *Lewis vs. Smith*, 2 Cranch C. C., 571.

In the court below the point was made that the objection was waived by the appearance and answer of the bank, but if there was not service upon the bank it cannot appear voluntarily. And even if it could, the bank has never appeared by its answer in this case. It never has answered, as the first answer was the individual answer of the cashier (decided by the court below), and the second answer was made by the bank voluntarily without additional service, and is invalid; but, supposing it were valid, it is not under seal.

"That a corporation must answer as garnishee under seal. See *Callahan vs. Hallowell*, 2 Bay, 8; *B. & O. RR. Co. vs. Gallahue*, 12 Grattan, 655."

A seal appears on the paper, put in voluntarily as a second answer, but nothing to show that it is the corporate seal of the bank. In *Branch Bank vs. Poe*, 1 Ala., 396, it seems—

“If the seal be used by another than the chief officer, it should appear to have been by the express authority of the directors.”

It was therefore held that an answer of a corporation, put in by its cashier, or the individual answer, under oath of either a president or cashier, is not sufficient. See, also, *Planters' Merchants' Bank vs. Leavens*, 4 Ala., 753.

Third. It is contended that *The Columbia National Bank of Washington*, in which the money sought to be attached is deposited, has never been attached, inasmuch as a corporation can only be attached by its *corporate name*. The return of the marshal shows no attachment on a bank by that name. The return says, “attached credits in the hands of Columbia National Bank.” That is not the corporate name of the bank assuming to answer; and the answer of any bank by that name is voluntary. And the judgment of condemnation against the *Columbia National Bank of Washington*, on an attachment levied on the *Columbia National Bank* is erroneous. In this case, by the certificate of the Comptroller of the Currency, filed, the words “*of Washington*,” are part of the corporate name. Again the answer, signed “*The Columbia National Bank, by its president, B. H. Warner*,” states that some other corporation, to wit: “The Columbia National Bank, *of Washington*,” has on deposit, etc.

It may be well to look at the rules governing payments under a judgment. In this proceeding it is an established rule that the garnishee shall not be prejudiced, and must be placed in a position to plead the condemnation judgment against any action brought against him. The payment must not be voluntary. All the facts required by statute to enable the attachment-plaintiff to hold the debt owned by the garnishee, must appear in the record of the

attachment suit, and that if it appear that the attachment was not legally served on the garnishee so as to reach the debt in his hands, his answering as garnishee, and the subsequent judgment against him, will not avail him. *Desha vs. Baker*, 3 Ark., 509; *Drake on Attach.*, 712.

Fourth. The condemnation should not have been made, because the money on deposit in The Columbia National Bank, of Washington, *is not the money of the defendants*; that is shown by the answer of the defendants, *sustained by affidavits*; that the defendants had the right to prove this can be shown by numerous authorities. The bank, in its answer [assuming it to have answered], states that it is informed that the money belonged to the clients of the defendants; that it could do so, see *Drake on Attach.*, 639. *Ib.*, 659.

"When a trustee deposits trust money in his own name in a bank with his individual money, the character of the trust money is not lost, but it remains the property of the *cestui que trust*. If such money can be traced into the bank, and it remains there, the owner can retain it. When deposited the bank incurred an obligation to repay it, which is not lessened or impaired because it incurred at the same time an obligation to pay other money belonging to the agent individually." *Wait's Actions and Defences*, Vol. 1, 503. See, also, *Van Allen vs. American Bank*, 52 N. Y.; 7 Sick., 1; *Disbrow vs. Mills*, 2 Hun., N. Y., 132 S. C., 4 N. Y., S. C. T. & C., 682.

Mr. FRANKLIN H. MACKAY for appellee (plaintiff):

The eighty-second rule of this court authorizes the issuing of an attachment against the defendant's credits. That rule was promulgated by authority of the act of Congress, and it is idle to go back to the old Maryland statutes to seek a remedy in this case when the remedy is furnished by the rules of court.

The only other defense worth noticing is the claim that the funds attached are trust funds. The reply to this

contention will be found in *Jackson vs. Bank of the United States*, 10 Pa. St., 61, where it was held that funds of third parties deposited by a judgment-debtor in his own name are liable to attachment on a judgment against him. That case is cited with approval by Judge Drake. Drake on Attach., Sec. 491, note. See, also, *Bank vs. Jones*, 42 Pa. St., 536, where the court said: "We hold *Jackson vs. Bank* to be good law." To the same effect is *Silverwood vs. Bellos*, 8 Watts (Pa.), 428.

Mr. Justice MERRICK delivered the opinion of the Court:

In this case a decree was had against the defendants for a specific sum of money. Upon that decree an attachment by way of execution was issued, which was laid in the hands of the Columbia National Bank of Washington City, in the District of Columbia, as garnishee, the bank being summoned to appear under the garnishment, and, in answer to interrogatories, set forth that it had in its possession a certain amount of money to the credit of the defendant in the cause. A motion was made to quash the attachment upon sundry grounds:

First. That the court had no jurisdiction to issue the writ of attachment in this case.

Second. That the writ of attachment was not duly served.

Third. That the defendant in the action, showing by an affidavit of his that the funds on deposit, although deposited to his credit, were, in point of fact, funds made up from divers sums which he had received as agent for third parties, the money was not liable to attachment, but was to be left in his hands and under his uncontrolled disposition, with a view that he might return it to the parties for whose benefit he held it.

So far as the first question is concerned—that the court had no jurisdiction to issue the writ of attachment—the argument goes upon the idea that prior to the organization of the present court the process of execution from chancery

was either by *feri facias* or attachment for contempt and attachment by proclamation, sequestration, &c., as provided in the Act of 1785, chapter 72, of the State of Maryland; and that in the absence of any specific legislative grant of power to issue an attachment by way of execution out of chancery this court could not do it.

By Rule 82 of this court it is provided in cases of decrees for money the process either of *feri facias* or attachment by way of execution shall issue for the recovery and satisfaction of the decree as at law. That rule was passed in pursuance of the provision of the act of Congress for the organization of this court, section 770, page 92, of the Revised Statutes of the District, which is in the words following:

“That the Supreme Court in General Term shall adopt such rules, &c., as it may deem necessary for regulating the practice of the court; and from time to time revise and alter such rules.”

It is objected that this is not making rules but is legislation. We are of a different opinion. We think the law is broad enough to authorize this court to control its processes and to prescribe them within the limits of the selection of a process known to the laws of the land. It was in that sense that the rule in its present form was adopted, as we understand. It has been practiced upon ever since its adoption without question, and we do not think that there is anything in the argument which has been submitted to justify us in uprooting a settled and universal acceptance of the construction of the power conferred by the statute from which I have read an extract. It might upset and disturb property interests to a degree that cannot now be foreseen and understood, if it were maintained that the court of chancery in the execution of its decrees has no power to issue an attachment by way of execution. No good purpose could follow from narrowing the construction and limiting the power which has been heretofore exercised

under the grant which I have read from the Revised Statutes. The *feri facias* is granted in terms.

The writ of sequestration and the attachment for contempt have always existed, and the writ of sequestration is very nearly akin to and is substantially the same in all its practical operation with the attachment by way of execution. Therefore, as we have said, there is no good purpose to be subserved in attempting to narrow the construction.

Process is a very different thing from jurisdiction. If it were a question of jurisdiction this court could not vest itself with jurisdiction by a rule. But process, which is the flower, or the fruit rather, of jurisdiction, is a matter to be regulated, and has always been regulated from the earliest time, by the practice of the court. The familiar processes to which I have just adverted, attachments with proclamation, process of sergeant-at-arms and sequestration, followed by the statutory addition of *feri facias*, have all been the outgrowth of chancery regulation itself, and not the growth of statute. It is only another familiar means to carry out the end, the power to accomplish which end had already been delegated by the proper legislative power.

The second objection, that the writ was not properly served, we think is likewise untenable. The writ was intended to attach credits in the hands of the Columbia National Bank of Washington City, by service upon the cashier. He was served with copies of the writ and interrogatories for the garnishee and upon the return of the writ the Columbia National Bank of Washington City appeared and answered. Its first answer not being under seal was objected to, and thereupon the answer was amended to as to appear under the common seal of the bank. The garnishee was sufficiently identified, as we think by the service of the attachment and the response to it under the circumstances and in the manner indicated. It is perfectly true that a person cannot make himself voluntarily a garnishee; but the bank did not make itself

voluntarily a garnishee in this case. The process was served upon it and it was identified by a name. It had that recognized name, and although the name was not given in full, it appeared by its full name and answered. That, it seems to us, was a sufficient service and a sufficient designation of the garnishee to accomplish the purposes of the writ and to subject the garnishee to the process of the court, and relieve it from the imputation of having voluntarily come in and answered to a writ which had never been served upon it.

The third objection, and the one of most importance as a practical question is, that upon the return of the writ and of the motion of the defendant it was suggested to the court that the funds attached did not belong to the defendant, he having set forth in his motion to quash and in the affidavit of his own clerk appended thereto, that the funds belonged to the several parties for whom he was an agent and on whose behalf he had deposited the funds, although they were deposited in his own name and to his general credit.

Upon an examination of the authorities it appears to be well settled that while a debtor having funds deposited in his own name in bank, which really belong to another person, are not absolutely, by force of the fact of having been so deposited in his own name, subject to the right of the depositor's creditors, yet the question always is who shall be the party by whose instrumentality they shall be exempted. *Prima facie* they are the funds of the debtor, being deposited in his name. While it is perfectly true that his creditor may follow those funds, or rather, his *cestui que trust*, the man in whose behalf he has deposited the funds, may come in and vindicate his title to them, and claim them, and that the creditors of the party whose funds are attached can have no better right to the funds than the debtor himself, yet the proper person must come into court for the purpose of asserting that right. Public policy forbids

the debtor himself, who has deposited the funds in his own name, from setting up the pretense that he holds them as trustee for another. If the party for whom he is trustee comes in, intervenes in the case by way of claim of property, or other suggestion, and demands the funds as his, and proves in point of fact that they are his by tracing the identity of the funds, although covered up with the name of the debtor, the court will withdraw its hand and allow the true owners to take the funds. But public policy forbids us to receive a suggestion of that sort from the debtor, for the debtor himself, the very next day, may resume the control which he had as between him and the garnishee over the funds and defeat both the attaching creditor and his own *cestui que trust*.

These distinctions are fully set forth in the case of Jackson against the Bank of the United States, in 10 Pa. St., where it is said that, although it may be suggested that the funds belong to another, that is no defense. In 57 Pa. St., 202, explaining Jackson *vs.* The Bank, it is said that where notice is given and the claim is made on behalf of the *cestui que trust* of the funds, and he establishes clearly his title to them, the hand of the court will be withdrawn, and the court will award that the funds be paid over to the true owner.

In 111 Mass., 496, reiterating the doctrine of both of these cases, the court declared explicitly that public policy forbids the court to allow such a defense to be made on behalf of the debtor himself. The true owner has the right to come in, and if the true owner stands by and remains silent, public policy requires that the funds shall be treated as the funds of the debtor and condemned under the attachment.

For these reasons we are of opinion that there is nothing in the various objections which were taken to the attachment; and that the judgment of the circuit court in overruling the motion and granting final judgment of condemnation was correct and must be affirmed.

SUSAN W. EDWARDS AND ALICE TYLER

vs.

CHAPMAN MAUPIN, TRUSTEE.

1. A testator may direct that the same discretionary power which he has given to trustees designated by himself shall belong to the trustee appointed by the court in case of a vacancy; but if he omits to do so, a discretionary power will be construed to be personal.
2. Where a sale has been made by a trustee appointed by the court, all parties interested in the estate are entitled to a hearing before the sale is finally ratified.
3. The rule which applies to this court in regard to appeals is entirely different from that applying to the Supreme Court and the circuit courts of the United States; in this court an appeal lies from any order involving the substantial rights of the parties.
4. An order overruling a motion to vacate an order ratifying a trustee's sale is an appealable order.
5. Where a purchaser at a trustee's sale having been notified of proceedings being taken to vacate the sale, voluntarily permits such proceedings to go on to a final decree without his intervention, it will be too late to come in after such decree has been affirmed.

Equity No. 7007. Decided November 19, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from an order of the Special Term in Equity refusing to set aside its former order confirming a sale made by a trustee.

THE FACTS appear in the opinion.

Messrs. LEIGH ROBINSON and HENRY WISE GARNETT for complainants :

In equity the *cestui que trust* is the absolute owner of the trust estate. The authority of the trustee is limited to the duties prescribed to him. The right of property given to these, the said trustees, and therefore the right which *they* had the power to sell, at public or private sale, was an estate commensurate with that of the beneficiaries for whom they held, to wit, a life estate. *Payne vs. Soll*, 2 Dev. & Bat. Eq., 455. *William vs. Holmes*, 4 Rich. Eq., 475, 485;

Smith *vs.* Metcalf, 1 Head, 64; Ellis *vs.* Fisher, 3 Sneed, 231.

But when once a suit has been instituted for the execution of a trust, that attracts the jurisdiction of the court, and the trustee, even the testamentary trustee, from that time, and even where he originally had discretion, is not justified in proceeding to a sale of the property without the sanction of the court.

Again, where a power given to the original trustee is of a kind that indicates personal confidence it will, *prima facie*, be confined to the individual to whom it is given, and will not without express words pass to others, to whom by legal transmission the character of the trustee may happen to belong; and though the estate, with the trust attached to it, will be in the trustee appointed by the court, yet the power (being one of that description) will be extinct. Hill on Trustees, 211 and 331; Cole *vs.* Wade, 16 Ves., 45. A power of sale in a settlement was given to A and B, the trustees to preserve contingent remainders, and the survivor of them, and the executors and administrators of the survivor: *Held*, that trustees appointed by the court in place of A and B could not exercise the power. Newman *vs.* Warner, 1 Sim., N. S., 456; Hill, 226.

As a general principle, a trustee has no power to change the character of a trust fund; and if he assume the power of converting real estate into personal, or personal into real, he acts at his peril.

If a loss has been sustained from the trustee exceeding his authority by an unauthorized and illegal disposition of the trust funds in his hands, he is liable for the loss. Quick *vs.* Fisher, 9 N. J. Eq., 802.

It is competent for the trustee to sell trust property by and with the consent and approbation of the *cestui que trust*, provided there be no restriction upon his powers in the deed and limitation over to children or third persons. Arrington *vs.* Cherry, 10 Ga., 429.

In decreeing a sale, the court will regard the interests of persons most to be affected by its action. *Troy vs. Troy*, 1 Busbee (N. C.), Eq. 85.

"It is certainly well settled that property held in trust or for life, with remainder limited over to persons, either known or unknown, is not absolutely uncontrollable, nor necessarily to be preserved unchanged in the same form and condition in which it was when it was first received under the original grant or devise. *By the authority of the legislature, and under suitable restrictions it may be sold.*" *Clarke vs. Hayes*, 9 Gray, 428.

"It is not the practice of the court of chancery to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; *nor for the mere purpose of increasing the income of an adult owner of a present interest in the estate.*" In the matter of *Margaret Jones*, 2 Barb. Ch., 22.

Where the *cestui que trust* is of age, or *sui juris*, the trustee has no right (*unless express power is given*) to change the nature of the estate, as by converting land into money or money into land, so as to bind the *cestui que trust*. 2 Story, Eq., Sec. 978.

The law will not permit the slightest antagonism on the part of the trustee. *Clarke vs. Deveaux*, 1 S. C., 172-185; 2 Johns. Ch., 254; 13 Ves., 381; 1 Story Eq., Sec. 322.

A trustee is under no circumstances to set up title adverse to his *cestui que trust*. Lewin, 285.

A *cestui que trust* may enjoin a trustee from the wanton exercise of his legal power. *Id.*, 855. *Bales vs. Strutt*, 1 Hare, 146; *Jenkins vs. Jones*, 2 Giff., 99.

A trustee cannot, by the suppression of a fact, entitle himself to a benefit to the prejudice of his *cestui que trust*. Lewin, 220.

A purchaser, by a deed from a grantor, who is a trustee, and so styles himself, has notice of the trust. *Pomeroy Eq.*, Secs. 630, 659, 770.

When trustees depart from that rule of conduct which their duty prescribes to them, neither they, nor those who claim under them, *with notice* of the trust and of its breach, can sustain an interest derived from their breach of trust. 1 Hovenden on Frauds, 484; Bigelow on Frauds, 239, Ch. 5, Sec. 5 of Trustees; Garth *vs.* Cotton, 1 Dickins Ch. (Eng.), 200 and 201; Adair *vs.* Shaw, 1 Schoales & Lefroy (Eng.), 262; Phayre *vs.* Peree, 3 Dow. (Eng.), 129.

Where the acts or omissions of a trustee are such as to show a warrant of reasonable fidelity, a court of equity will remove him. Cavender *vs.* Cavender, 114 U. S., 472.

Commissions are allowed to trustees as a compensation for services in the execution of the trust, and in case of gross neglect or of unfaithfulness, the court may properly disallow them. Cook *vs.* Lowrie, 95 N. Y., 104. If full commissions cannot be allowed on the voluntary rendering of an account for the purpose of securing full commissions (Cram *vs.* Cram, 2 Redf., 244), how much less should a court of equity suffer a trustee to forcibly seize commissions, awarded by himself, upon the sale of property, made in violation of the wishes and instructions, and in outrage of the rights of the beneficial owners?

Mr. FRANK W. HACKETT for defendant.

Mr. Justice JAMES delivered the opinion of the Court:

This cause comes here on appeal from an order of the Special Term in equity refusing to set aside its former order confirming a sale made by one James B. Green, as trustee. The merits of the question involved will appear in the following statement of facts:

A certain Mary E. Macpherson, of Baltimore, died in the year 1873, leaving her last will and testament, by which, after making several unimportant bequests, she devised as follows: "Unto my nephews, Chapman Maupin and Robert W. Maupin, of the State of Virginia, in fee simple, my lot, with the house and other improvements thereon, on F street between Fifth and Sixth streets, * * * in the

city of Washington, to be held by them and the survivors of them, and by such person or persons as may be appointed to execute the trusts declared by this my last will, by the last will and testament of such survivor, or by other instrument of writing executed for that purpose by such survivor; but in trust, nevertheless, to manage and control the same, and to take the rents, profits, and income thence arising and to pay the one-half of the net amount received * * * to my daughter, Susan W. Edwards, for and during her natural life."

And after the death of the said daughter, the trustees were to pay the said moiety of rents to the separate use of the granddaughter of testatrix, Susan W. Edwards; and, after the death of the latter, were to distribute the whole of the said moiety according to certain contingencies.

As to the remaining moiety of rents, the will directed that they should be paid to the sole and separate use of the granddaughter, Alice Tyler, gave to Alice Tyler power to appoint said moiety, and then provided where it should go on certain contingencies. It then provided as follows:

"And I do hereby confer upon my said trustees full power and authority, at his or their discretion, from time to time, to sell by public or private sale * * * all or any part of the trust property in this will devised and bequeathed to my said trustees, and to receive, grant acquittances for, and re-invest the proceeds of such sales," &c.

It appears that one of the trustees, Robert W. Maupin, died in 1876; that the other, Chapman Maupin, expressed a desire to resign his functions, and that thereupon Susan W. Edwards, widow, and Alice Tyler, by her next friend, filed a petition in this court stating these facts, praying an account by the surviving trustee, and the appointment of a new trustee. Chapman Maupin, in his answer, admitted these allegations, offered to account, and expressed his desire to resign his trust.

On March 29th, 1882, the following decree was made:

"That the fee-simple estate in lands located in the city of Washington, D. C., devised by the last will and testament of Mary E. Macpherson, deceased, to Chapman Maupin and Robert W. Maupin, upon certain trusts declared in said will, be, and the same is hereby, taken out of the said Chapman Maupin, the survivor of the said co-trustees, and vested in James B. Green, of the city of Baltimore, together with all the rights, powers, duties, and obligations incident thereto under the said last will and testament. And it is further adjudged, ordered, and decreed: That all the trusts vested by the said will in the said co-trustees, and surviving to the said Chapman Maupin, be, and they are hereby, abrogated and repealed as to him and conferred upon the said James B. Green, subject to the terms of the said last will and testament, and that the retiring trustee pay over and deliver to his successor, hereby appointed, all money, books, papers, and other property belonging or relating to the said trust estate.

"And it is further adjudged, ordered, and decreed: That the said James B. Green, trustee, as herein provided, shall file with this court, before any sale of the said real estate under the powers contained in the said will, a bond in the sum of \$8,000, with a surety or sureties to be approved by this court, for the faithful performance of his duty in connection with the said sale. And that he shall at all times be subject to the control and order of this court in matters touching the trust. And that the costs of this proceeding are payable out of the principal of the trust estate.

About eighteen months after his appointment a correspondence began between the substituted trustee and the devisees of the rents, in which the trustee urged the propriety of selling the property and re-investing the proceeds in loans, while the devisees objected to the proposed transactions. In November, 1883, he submitted to them an offer of \$5,500; in April, 1884, he expressed surprise and annoyance that they should disapprove of a sale at \$6,500, and

endeavored to convince them that that was "a capital offer;" in October, 1886, he wrote several letters from Los Angeles, California, whither he had removed his residence, urging the acceptance of \$8,500. In this correspondence Mrs. Edwards had stated her opinion that the property was worth \$12,000, an estimate which the trustee, judging from the more advantageous point of a very distant residence, characterized as fabulous. He expressed at first only solicitude that the devisees of the rents should, by means of a reinvestment at 6 per cent. enjoy a larger income, and that the remaindermen should avoid loss by deterioration of the house. But when Mrs. Edwards, in answer to his arguments, intimated a wish that he should relieve himself of the anxieties of the trust, he stated, in a letter dated December 2, 1886, "frankly and calmly," as he assures her, the terms on which he would retire. In order to do justice to this offer we give his own words: "If the property be worth what you and your friends value it, at (\$12,000), my commissions at 5 per cent. on its sale will be \$600; but estimating on the sale I recently made, at \$8,500, as the true basis, \$425 will be my compensation; nearly \$2,000 in rent and collection from Chapman Maupin have passed through my hands since I took charge, and the commissions at 5 per cent. on this amount would be \$100; add this to the \$425, and you have the amount I am called upon to relinquish. If you send me a draft on New York for \$525 I will petition the court to let me resign, release my securities, and appoint Mr. H. H. Raleigh, my successor." The trustee's arithmetic appears to be trustworthy. In a previous letter to Mr. Raleigh, the gentleman just referred to, he had said: "As to the trusteeship, it has never been the source of any profit to me, but the property in my hands has been kept up and has increased handsomely in value (he forbears to add that this increase had enured to the benefit of the estate by the defeat of his propositions to sell), and, to be frank with you, I would rather remain trustee until the

closing up of the estate, when I will become entitled to commissions as compensation for my services; as a business man, you will readily grasp this proposition." In the light of what followed later we think it may, in the suggestive language of the trustee, be grasped.

We note, especially, the fact that his solicitude for the rescue of the estate from the dilapidation of a house of little value was coupled with another solicitude of a somewhat antagonistic aspect, and that he had indicated, in his letter to one of the devisees of the small rents, a readiness to abandon the devisees to their own folly, if they would pay him out of their poor rents the highest commissions to which he could be entitled by having rendered the most beneficial service.

The next step appears in a report filed by the trustee in the Special Term in Equity on the 7th of March, 1888, in which he stated that on the 31st of January of the same year, he had, through the agency of J. H. Gray & Co., sold the estate to one A. M. Kennedy for \$11,000 cash, to be paid on ratification of the sale. In this report he asked for ratification of the sale, while expressing the belief that he had ample power under the will independently of the court. The sale was confirmed on the same day without notice to the devisees of the rents, or to other parties interested in the estate. At the same term of the Equity Court, Mrs. Susan B. Edwards and Alice Tyler filed their petition, praying that the order confirming the sale be set aside as improvidently made; that Green be removed from his trust, and that some responsible person be substituted. On this petition Green, the trustee, and Kennedy, the purchaser, were ruled to show cause why the order of ratification should not be set aside. At a later day of the same term Green was ordered to pay into the registry of the court all the fund in his hands as trustee. The cause was heard upon the petition and the answer of Green, and on May 2, 1888, the prayer of the petitioners was denied. It is from this order that the appeal is now taken.

Green, in showing cause, states that the surviving testamentary trustee, having power to appoint a successor with all his own powers, had in fact exercised that power by the deed which he executed to the substituted trustee after the decree appointing him. He claims, therefore, to have been invested with power to sell both by the decree of substitution and by Maupin's appointment. The effect of both of these is consequently to be considered.

We hold it to be clear, first, that the will itself did not give the power to sell and re-invest to any person besides the original trustees, and the person whom the surviving trustee was to appoint. Whether that power was intended to vest even in the latter we need not decide. It is enough that the will made no provision for vesting such power in the person whom a court of equity might appoint in the exercise of its ordinary jurisdiction to prevent the failure of a trust by filling a vacancy. A testator might direct that the same discretionary power which he had given to trustees designated by himself should belong to the trustee appointed by the court in case of a vacancy, but if he omits to do so a discretionary power will be construed to be personal. It follows that this power of sale and re-investment did not vest in the substituted trustee as an incident to the trust in which he was substituted. If it belonged anywhere it belonged to the court and was to be exercised under its control. It remains to be considered whether the decree in this case intended to vest its power in the substituted trustee, and that he should sell and re-invest in the same manner as the original trustee. We think it is plain that it does not admit of any such construction. Whatever may be suggested by its language in divesting the title and powers of the surviving testamentary trustee and vesting them in Green, it is to be observed that the latter was distinctly made the court's trustee, and that he was, by an express provision of the decree, to be at all times "subject to the control and order of this court in

matters touching the trust." It is impossible to state more plainly that he had no discretionary power. If he was at all times to be subject to the order of the court, he must be subject to its order as to making any sale and re-investment, and when any sale should be made it must be a sale by order of the court. It may be added that, even if the will had contemplated that a substituted trustee might exercise the discretionary power to sell he could be required by the court, when once the cause came into its hands, to act under its control.

The remaining proposition, namely, that the deed executed by Maupin to the substituted trustee was an appointment under the will, and gave the same power of sale which he had possessed, hardly needs consideration. Maupin was himself a party to the petition asking for a substitution. He was at once under the control of the court, and could do nothing to enlarge powers which the court chose to limit.

Moreover, every power which he himself had possessed under the will, including this very power of appointment, had been divested by the decree when he attempted to act. If he could no longer appoint, Green could not receive any power from him.

The validity of this sale, then, depends wholly upon the propriety of the ratification by the court, and its refusal to set aside that order. And as to this, it is to be remembered that parties interested in the estate are absolutely entitled to a hearing before their interests are disposed of by the court. In this case the sale was made and confirmed without notice to them, and without giving them a day. Whether the price received was a fair price, and whether it was desirable, in view of the rise in values of property in that vicinity, that a sale should never be made at all, are questions of doubt; but whether the trustee has acted properly seems to be a question of no doubt at all. We are of opinion, in view of all the circumstances, that this sale should not be confirmed, that the order refusing to set aside

must be reversed, that Green should be required to pay into the registry what he has retained as commissions, and that he should be relieved from his trust.

NOTE.—After the announcement of the foregoing decision, Alexander Kennedy, purchaser at the trustee's sale, filed a petition for rehearing. Upon this petition

Mr. Justice MERRICK delivered the opinion of the Court:

We have had under consideration the petition of Alexander Kennedy, who was a purchaser of the property in the case of *Edwards vs. Maupin*, in which the court announced an opinion on Monday last, deciding to set aside the proceedings of the court below ratifying the sale, and discharge the trustee for misconduct. This petition now seeks to have that decree or proposed decree modified so far as to save the petitioners' alleged rights as purchaser of the property in question, and he bases his petition upon the suggestion that inasmuch as the order appealed from was an application for a rehearing of an order passed at the same term, it was purely a discretionary order, and therefore unappealable.

There is a considerable misapprehension as to the extent of the right of appeal from the Special to the General Term, and this grows out of the fact that the decisions of the Supreme Court of the United States as to what is and what is not appealable from the circuit courts to the Supreme Court of the United States are relied upon as applicable to this court.

But the rule which applies to this court in regard to questions of appeal is entirely different from that applying to the Supreme Court and the circuit courts of the United States. When the question of the right of a party to an appeal is raised here it is not sufficient that the appeal is from a discretionary order which would not be the subject of appeal from a circuit court to the Supreme Court of the United States. The word "discretion" means in the chancery court, a very different thing from a discretion exercised

by the court in regard to those interlocutory orders which are made in the progress of a cause, such as an order granting time, an order opening depositions and taking further depositions, an order setting down a cause for hearing or granting a continuance, and things of that kind—all these are in the proper sense discretionary. But there are other orders which, though they may be classed as discretionary, are not for that reason unappealable if substantial rights have been involved. The tendency of the courts of to-day is to give the right of review by appellate tribunals whenever the substantial rights of the parties are involved. It is apparent that in this case the most substantial rights of the parties were involved. Here is an application at the same term at which an order is passed ratifying a sale, which, being passed and not appealed from or corrected in any other mode, would definitely settle the rights of the parties and deprive the petitioners absolutely and forever of a title to real estate, by the conversion of the realty into a sum of money; whether the full or an inadequate price for the value of the land need not be considered.

In that state of case, according to chancery practice there would be two courses open to the party aggrieved. To apply to vacate that order upon a motion in the nature of a motion for a rehearing, based either upon error appearing upon the face of the proceedings or upon some newly discovered matter for the first time brought to the attention of the court. He would also have the right to allow the term to pass and file a bill of review for the same reasons. The party in this case chose, and very properly chose, the simpler mode of applying to the court to vacate the order. The application was substantially based upon the ground of fraud, and for error apparent upon the face of the order, and also for newly discovered evidence which had not been previously brought to the attention of the court. The court refused to grant the motion and an appeal was taken. We entertained the appeal and announced on Monday last the

conclusion to which we had arrived, and the extent of relief which we determined to grant.

The suggestion now is want of jurisdiction.

We have considered the petition very carefully, and the court has not been persuaded to change its opinion in any respect, and the petition, therefore, will be dismissed.

It may be added that there is no merit whatever in this application to the court at this late date and for the first time, because upon the face of the petition it appears that the petitioner was notified of the proceedings in special term and knew of the progress of the cause up to the time of the appeal; but he took the position that he would not be prejudiced; that his rights would not be involved in the proceedings. Every man, when he is notified of the facts, is charged with knowledge of the legal consequences of those facts, and if the petitioner erred in his judgment as to what conclusions this court might arrive at upon consideration and argument as to the rights of the parties in this case, he cannot say that he has been taken by surprise or been aggrieved, for he has had his day not only in the Special Term, but also might have had his day upon final argument in this court. He is, therefore, without any claim whatever to have the matter considered. This conclusion has been reached by us only after very careful deliberation.

The petition is accordingly dismissed.

S. F. EMMONS

vs.

H. W. GARNETT.

1. The appointment of a receiver by a court of equity for the temporary care of property pending a controversy in the Orphans' Court over the right of administration is not an appealable order.
2. Under the Married Woman's Act of this District a wife is capacitated to make a will without the consent of her husband; what the will is to operate upon is another question and one which the Orphans' Court has no jurisdiction to pass upon; its power extends only to inquire into matters which relate to the probate, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument.
3. When the probate is granted, and not before, the authority to determine what passes under the will is devolved upon the courts of law and equity.
4. The fact that the husband does not object to the probate of a will executed by his wife does not, since the passage of the Married Woman's Act, estop him from afterward raising the question as to what property passed by the will.
5. Where a caveat has been filed to the probate of a will and issues have been framed to be sent to the Circuit Court for the trial, it is error for the Orphans' Court to direct who shall stand upon the record as plaintiff and who as defendant; that duty belongs to the Circuit Court.
6. While this court does not lay down the rule as absolute in all cases that the caveator shall be plaintiff and the caveatee defendant, yet, as a general rule, it is the proper mode of procedure for the caveator to open and close to the jury.

Two Cases. Decided November 26, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

This case and The Matter of the Estate of Weltha A. Emmons, deceased, being cases relating to the same subject-matter, were heard and decided together. The first an appeal from the Equity Court, and the other from the Orphans' Court.

THE FACTS are stated in the opinion.

MESSRS. ANDREW C. BRADLEY and LINDEN KENT for Emmons (appellant):

The testamentary power of the wife with respect to this property was dependent upon the assent of the husband

to the will, either before or after the same was made. The court could only assume jurisdiction upon such alleged assent, which is not made in this case. *Kurtz vs. Sayler*, 20 Pa., 205; *Schouler H. and W.*, Sec. 458; *Compton vs. Pierson*, 28 N. J. Eq., 229; *Cutter vs. Butler*, 25 N. H., 343, 359.

A married woman has no power to bequeath property except with the assent of her husband. *Vreeland's Executor vs. Rynor*, 26 N. J. Eq., 160; *Beale's Executor vs. Stone*, 26 N. J. Eq., 372; *Osgood vs. Breed*, 12 Mass., 525; *Cassel's Adm'r vs. Vernon, Ex.*, 5 Mason, 334; *Parker vs. Parker*, 11 Cush., 519, 524-528; *Judson vs. Luke*, 3 Day, 318; *Van Winkle vs. Schoonmaker*, 15 N. J. Eq., 384.

One of the questions entering into the consideration of whether or not the will of a married woman should be admitted to probate, is the property testamentary property of the wife. *Cutter vs. Butler*, 25 N. H., 359.

It is submitted that the will of Mrs. Weltha A. Emmons, a married woman, could not be admitted to probate until the questions raised as to her testamentary capacity and the assent of her husband to the will had been determined, and that the caveator was entitled to an issue to try the same, and that the Orphans' Court erred in denying the same.

The *onus probandi*, where the issue is testamentary, capacity, has always been on the caveator, in recognition of the principle that every one is presumed to be sane.

The caveators are the actors originating the proceedings, and are entitled to be placed on the records as plaintiffs. *Higgins vs. Carleton*, 28 Md., 143; *Brooks vs. Townsend*, 7 Gill, 10; *Edlin vs. Edlin* 6 Md., 292; *Tyson vs. Tyson*, 37 Md., 582; *Hickley's Test. Law*, Sec. 625; *Carrico vs. Kerby*, *Kerby*, executor, 3 Cr. C. C., 594.

MESSRS. WALTER D. DAVIDGE, CONWAY ROBINSON, JR., and W. V. R. BERRY for Garnett (appellee).

The Probate Court decides merely on the *factum* of the will and that it was the testamentary act of the testator;

when probate is granted, authority to determine what passes under the will is *devolved* upon the courts of law and equity. Michael *vs.* Baker, 12 Md., 169; Buchanan *vs.* Turner, 26 Md., 4; Schull *vs.* Murray, 32 Md., 16; Hinkley's Testamentary Law, Secs. 39 and 1519; Whitfield *vs.* Hurst, 9 Ired., (N. C.) L., 170.

And this is so, though everything* which is disposed of by a married woman's will was afterwards conveyed away by her by deed during her life. Still held: That probate should be granted of her will, leaving the question of what, if anything, may pass by her will to be decided by the court of construction. Parkinson *vs.* Townsend, 23 W. R. (Eng.), 636, 637.

A *feme covert* may act in reference to her separate estate as a *feme sole*, and may *alienate* it or *dispose of it in any manner*, where the settlement contains *no limitation* on the subject, on the principle that the *jus disponendi accompanies the property* unless restrained in terms, or by the manifest intention of the instrument. 3 Pom. Eq., Secs. 1104 and 1105; Cook *vs.* Husbands, 11 Md., 492, 505 and 506; Michael *vs.* Baker, 12 Md., 158, 168 and 169; Chew *vs.* Beall, 13 Md., 348, 359 and 360; Mary *vs.* Michael, 18 Md., 227 and 241; Buchanan *vs.* Turner, 26 Md., 1, 5 and 7; Schull *vs.* Murray, 32 Md., 15 and 16; Prout *vs.* Robey, 15 Wallace, 471; Smith *vs.* Thompson, 2 Mac Arthur, 295.

She may, therefore, unless restrained by the terms of the gift or instrument, make a *will* of her *equitable separate estate* as a *feme sole*. Cook *vs.* Husbands, 11 Md., 505 and 506; Michael *vs.* Baker, 12 Md., 169; Mary *vs.* Michael, 18 Md., 241; Buchanan *vs.* Turner, 26 Md., 5 and 7; Schull *vs.* Murray, 32 Md., 15 and 16; Smith *vs.* Thompson, 2 Mac Arthur, 295; Maiden *vs.* Bebo, 6 Fla., 389.

Letters of administration (as contrasted with letters testamentary) cannot be granted unless it be *proved to the satisfaction of the court* that the party died *intestate*. Md. Act of 1798, Ch. 101, Subch. 5, Secs. 3 and 4; Hinkley's Testamentary Law, Secs. 683 and 690.

When the will is authenticated or proved, as directed by the act, letters *testamentary* (not letters of administration) may forthwith be committed to the executor or executors named in said will. Md. Act of 1798, Ch. 101, Subch. 3, Sec. 1.

The form of *letters testamentary*, as provided by statute, grants and commits administration of *all* the goods, chattels, and credits of the deceased unto the executor by said will appointed. Md. Act of 1798, Ch. 101, Subch. 3, Sec. 13; Ward vs. Glenn, 9 Rich. (S. C.), 127-132.

The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him is sufficient to make it a will, and as a will it is to be proved. 1 Williams on Executors (6 Am. Ed.), 267 [227]; Goods of Jordan, L. R., 1 P., D. & M., 555; Goods of Miskelly, 4 Ired. R. Eq., 62; Brenchley vs. Lynn, 2 Robertson's Ec. R., 469, 470, and 571.

The Orphans' Court is by statute prohibited from exercising, under any pretext of incidental power or constructive authority, any jurisdiction not expressly granted by statute. Md. Act of 1798, Ch. 101, Subch. 15.

The Orphans' Court has no authority or jurisdiction to grant administration to any one whilst there are existing executors capable of acting. The Orphans' Court has no jurisdiction except such as is expressly granted. Ward vs. Glenn, 9 Rich. (S. C.), 127 to 132; Griffith vs. Frazier, 8 Cranch., 9-30; Kane vs. Paul, 14 Peters, 39.

An executor should not take out administration on an undevised estate. He should administer it *ex officio* as executor. Hayes vs. Jackson, 6 Mass., 152.

The Orphans' Court was right in refusing to grant letters of administration to Mr. Emmons, as surviving husband, for even if he were right in his pretensions and claims that his wife died intestate, and that the property of his wife belonged to him *as her surviving husband* (which, of course, we deny for the reasons already stated), still there was no

necessity or occasion for the court's granting him letters of administration. The Maryland Act provides that "if the intestate be a married woman, it shall *not*, as heretofore, be necessary for her husband to take out letters of administration, but all her *choses in action* shall devolve upon her husband in the same manner as if he had taken out such letters. Md. Act of 1798, Ch. 101, Subch. 5, Sec. 8.

The person named as executor in the will of a married woman, which disposes of personal property, is, however, in a very different position. It is laid down that, "until probate of the will is granted the person to whom the property is left *would be unable to recover it*. *Michael vs. Baker*, 12 Md., 169; *Buchanan vs. Turner*, 26 Md., 4.

Until probate is first granted the party claiming under the will cannot assert title in the law or equity courts. *Probate is indeed necessary to enable parties claiming under the will to assert*, in the appropriate forum, their title to the property it professes to pass. *Schull vs. Murray*, 32 Md., 16.

Mr. Justice MERRICK delivered the opinion of the Court:

These two cases, touching the estate of the late Mrs. Weltha Emmons, were argued together and in some respects the cases are so connected that they will be decided together.

The first is an application for the appointment of a receiver in chancery, pending a controversy in the Orphan's Court about the will and the administration under, or external to, the will of the late Mrs. Weltha Emmons, who was a married woman at the time of her decease. The court of equity appointed a receiver in aid of the administration, and for the purpose of the temporary protection of the property, by reason of the title to certain portions thereof being in dispute as to whether it was the property of the decedent or of strangers, and also by reason of the imperfection of the testamentary law in not providing the necessary instrumentalities for the custody and vindication of the title of such property *pendente lite*.

The receiver having been appointed, the respondent in that case appealed to this court. We are of opinion, according to the settled practice of the court, that the receivership, under the circumstances, is a mere interlocutory proceeding, not affecting or prejudicing the rights of any party; nor interfering with or invading in any manner the jurisdiction of the Orphan's Court, and, therefore, in no sense an appealable order. For this reason, without going at large into that branch of the case, the appeal is dismissed.

The other case is an appeal from the orders of the Orphans' Court granting issues, for the purpose of determining the validity of the will of Mrs. Emmons. Three issues were ordered by the justice holding the Orphans' Court, and two issues, which were tendered on behalf of the contestants of the will were rejected. The justice also, having granted certain issues and rejected the others, added an order directing which party should stand as plaintiff on the trial of the issues in the Circuit Court and which as defendant. From those orders appeal was taken.

Against the issues which were granted there is no objection. The appeal is as to the issues which were rejected, and as to the order assigning the manner in which the cause should be conducted at the circuit.

The two issues which were rejected were, whether the paper offered for probate was made with the assent of the husband; and, whether the said decedent died possessed of any property as to which said will could be operative.

We think that the justice was entirely correct in the rejection of both of those offered issues, for the reason that under the Statutes of this District a married woman has the power to make a will. What the will may operate upon is a distinct thing from the testamentary power which is granted to her. There are certain exceptions as to her capacity to dispose of property by the will; that is to say, there are certain kinds of property which she cannot dispose of, but the general testamentary capacity is conferred

upon her by the statute. That capacity having been conferred, it is not the function of the Orphans' Court to determine what property shall pass or shall not pass under the will. It was, therefore, entirely inappropriate, and the court so found, to ascertain whether the will was made with the assent of the husband or not, and equally inappropriate to determine whether the decedent died possessed of any property upon which the will should operate. The function of the Orphans' Court is simply to determine whether the deceased had a testamentary capacity, authorizing her to make a will. How far the will can operate is another question, and should not be mingled or confounded in the issues before the Circuit Court with the question of the fact of the will, or the intellectual capacity to make a will, or the formalities in the execution of the will.

There was a good deal of argument that unless the issue whether the will was made with the assent of the husband was passed upon, the husband would be precluded afterwards from objecting to any property passing under that will; but that argument was founded upon authority which belongs to institutions that do not exist here. It is an exceedingly common occurrence, which has been commented upon very admirably by the Supreme Court of the United States, in *Townsend vs. Jemison*, 9 Howard, at page 415, that parties in citing cases under institutions different from those where the questions are raised, are led into error, because there is no connection between such institutions, and the decisions are under quite a different system of law. So it is here with regard to this particular issue. Those decisions are perfectly correct in States where the wife has only capacity to make a will by the consent of her husband, as was the case at common law. There, if the husband suffer the will to go to probate, the presumption was, that he had assented to the will, and the assent of the husband gave vitality and force to such a will of personal property. But with us, the wife having testamentary capacity, where

her will is offered for probate, the fact that he does not object to the will and show that he did not consent to it does not in any sense of the term operate by way of estoppel against him so as to preclude him from raising in the proper tribunal the question as to what property passed under her testament. She having a legal faculty to pass property of some sort or other by the statute, it is never the function of the Probate Court in determining her capacity to make a will, to inquire what property that will is to operate upon.

If any authority is needed for that proposition, and in support of the ruling of the court below upon that point, it is found in the case of *Schull vs. Murray*, 32 Maryland, 16, where the court say that the capacity to make a will without the consent of the husband being thus conferred upon a *feme covert*, a will executed by her, professing to dispose of her property must be admitted to probate in the same manner as that of any other person capable in law of making a will; and the jurisdiction of the Orphan's Court is limited to the inquiries which relate to the probate alone, as in other like cases, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument. When the probate is granted, and not before, the authority to determine what passes under the will is devolved upon the courts of law and equity, tribunals which are clothed with ample jurisdiction to decide that question.

That disposes of both the rejected issues.

The remaining objection is to the order of the Orphan's Court assigning who should stand upon the record as plaintiff and who as defendant. We think the Orphan's Court was in error in passing that order, because it belongs entirely to the Circuit Court, where the issues are to be tried, to determine who shall be plaintiff and who shall be defendant on the record. It is the uniform practice in the State of Maryland, from which we derive our probate system, in a trial of issues from the Orphan's Court before the Circuit

Court, to make the caveator plaintiff on the record and the caveatee the defendant. That is the act of the Circuit Court, not the act of the Orphan's Court. A case in which the question was determined definitively and set at rest by the Court of Appeals of Maryland, was the case of *Stockdale vs. Cullinson*, 35 Maryland, 322, where the court said that it was the uniform practice in the State of Maryland to make the caveator the plaintiff and the caveatee the defendant, no matter what the issue was. This is in entire analogy to the practice of the courts of law in the trial of issues. It does not make any difference who has the affirmative of any issue in a court of law as to the privilege of opening and closing before the jury. A familiar instance is where there is a plea in confession and avoidance. Now, although the defendant has the affirmative upon himself to sustain his plea of confession and avoidance, nevertheless the plaintiff opens and closes the case before the jury. We must not confound the opening and concluding before the jury with the opening and concluding in assuming and discharging the burden of proof before the court and jury. The plaintiff, where there is a plea in confession and avoidance, simply opens his case by stating it before the jury, and then the defendant brings in his affirmative proof, and the burden is upon him all the way, in such a case, to maintain his plea. Nevertheless, though the burden be upon him throughout, so far as the proof is concerned, the privilege remains with the counsel for the plaintiff to open and conclude the argument before the jury, and so with regard to the case of caveator and caveatee.

In this jurisdiction, while it has not been definitively settled that the caveator shall in all cases open and conclude before the jury, yet it has been settled that it is for the Circuit Court, and not for the Orphans' Court, to determine that question, it being beyond the jurisdiction of the Orphans' Court and within the province of the Circuit Court to regulate its own methods of trial.

This court has also gone further, and said that while it would not lay down the rules as absolute in all cases, yet as a general rule it was the proper mode of procedure for the caveator to open and close to the jury, and they would not undertake to define the rule more exactly until the question arose properly for their decision.

The ruling of the Orphans' Court, therefore, so far as that matter is concerned, will be reversed, and in all other respects sustained, and the cause remanded, that the issues may be sent up with that correction, leaving the attitude of the parties before the court and jury upon the trial to be determined by the Circuit Court itself.

Decree reversed in part and affirmed in part, with an allowance of his costs to the appellant.

MILLIE THOMAS

18.

WILLIAM F. HOLTZMAN.

1. Where slaves with the consent of their masters lived together in the State of Maryland as husband and wife, such a union, according to the custom of that State, was sufficient to establish a marriage between the parties. Consequently, under the act of Congress of February 6, 1879, the issue of such a marriage must be regarded as legitimate in the District of Columbia for all the purposes of descent and inheritance.
2. Where the defendant in a partition suit has no interest in the moiety claimed by the complainants, the court will not scrutinize very closely the weight of the testimony introduced upon the issue raised as to the title of the complainants as heirs of the admitted former owner.

In Equity. No. 10,300. Decided November 26, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

BILL in equity for partition. Heard in General Term in the first instance.

THE FACTS are sufficiently stated in the opinion.

Messrs. COLE & COLE for complainants.

Messrs. A. A. BIRNEY and E. A. NEWMAN for defendants:

The plain case here presented has never been before the court. In *Thomas vs. Ragan and Green vs. Norment* the court held that "the fact that parties *who had been slaves came to this District and lived as free people*, in the relation of husband wife, for some time, was evidence of actual, legal marriage between them." 5 Mackey, 86.

There is no such proof here, and nothing which supplies its place.

In Maryland it has been directly held that a *ceremony of marriage* is necessary to a valid union.

In *Denison vs. Denison*, 35 Md., 361, it appeared that the parties agreed to thenceforth regard each other as husband and wife. "That in pursuance of such agreement, they cohabited and lived together as man and wife; that the

appellee was maintained and supported by the deceased up to the time of his death, as his wife, and that they both acknowledged, recognized, and acted towards each other in all things as husband and wife, and were known, treated, and reputed to be such among their friends and acquaintances."

The court held (page 379) that the acts of 1715 and 1717 "clearly shows that no such marriage as that here alleged to have been contracted was ever contemplated by the legislature *or was ever supposed for a moment to be good*. The Act of 1777, Ch. 12, concerning marriages * * * plainly indicated the understanding of the legislature to be that no marriage was to be thereafter good and valid unless celebrated by some religious rites and ceremonies. The union was held to be no marriage.

Applying then to the union of slaves in Maryland the *same rule as that applied by the Maryland courts to unions of free persons* in that State, it is clear that Milly Thomas' connection with either of her so-called husbands gave no rights of inheritance to her offspring.

Aside from the question above considered, the connection, without cohabitation after freedom, was no marriage.

Bishop on Marriage and Divorce, Vol. 1, 162, ed. of 1864, states the principle upon which the author deems "that the decision in all such cases ought to turn," which is, "*If after the emancipation the parties live together as husband and wife; and if before emancipation they were married in the form which either usage or law had established for the marriage of slaves; this subsequent mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced.*"

And (Sec. 163), "But where there is no confirmation of the marriage after emancipation, either by cohabitation or otherwise, it would come within the reason of the law * * * to hold the parties free from matrimonial bonds."

We have not been able to find decisions opposed to the text just quoted. In a case recently decided in Chicago, involving this question, and reported in the daily press, "Judge Finley decides that the issue of a slave union was an illegitimate child, and could have no heirs except those of her body." The ground of the decision is that "slaves, being chattels, no legal marriage was possible, any more than real estate can marry real estate."

The act of Congress of February 6, 1879 (Richardson's Supp., 409), is unconstitutional, in that it affects persons *according to their color*. It provides "That the issue of any marriage of *colored persons*," &c. Previous condition of slavery is not mentioned in any way, the statute affecting *free* colored persons as well as others.

We have already pointed out that the issue of a union of *white* persons contracted as in this case would be held illegitimate. *Dennison vs. Dennison*, 35 Md., 361.

We submit that a statute which leaves such (white) children without heritable blood, and gives right of inheritance to children of darker skin born under similar conditions, is unequal, arbitrary, partial, and rests upon no reason upon which it can be defended. It operates as denial to the white citizen of that "equal protection of the laws" provided for by the Fourteenth Amendment. Judge Cooley doubts whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law could be sustained, notwithstanding its generality. *Const. Lim.*, 393.

In a case in Tennessee the court held void a statute applying only to suits brought by persons of a particular class, to wit, Indian reservees. *Wally's Heirs vs. Kennedy*, 2 Yerger, 554. See, also, *Lewis vs. Webb*, 3 Greenl. R., 326; *Soon Hing vs. Crowley*, 113 U. S., 703; *Civil Rights Cases*, 109 U. S., 3.

But, if constitutional, the statute will not help complainants, for the method of marriage or "custom prevailing at

the time," was regulated by statute, which required a *ceremonial marriage*. The proof negatives such ceremony. Jones vs. Jones, 36 Md., 447.

Mr. Justice MERRICK delivered the opinion of the Court:

In the case of Millie Thomas against Holtzman, or, as it is otherwise entitled, Eliza Queen and others against Holtzman, since Eliza Queen and others came in by bill of revivor on the decease of Millie Thomas, for the purpose of determining the question of partition as between the estate of Millie Thomas and Holtzman, touching a certain lot of ground in the city of Washington, it was objected by the respondent in equity that Eliza Queen and the others, now seeking to be made parties to the bill of revivor, were not the legitimate children of Millie Thomas.

It appears in the proof that Millie Thomas had for her husband one Henry Queen, a free colored man, and that she, being a slave, lived with him as her husband, recognizing the relation of husband and wife between them, with the consent of her master; and during that marriage two of these plaintiffs were the fruit of the union. The first husband died, and then, in a similar manner, she associated herself with another man by the name of Thomas, and lived with him, recognizing him as her husband, and that as the fruit of that union two other children were born. Her second husband subsequently deserted her at about the outbreak of the war and never returned, and, so far as it is known, is dead. These four children, the fruit of these two marriages, claim to be the heirs at law of Millie Thomas.

It is objected on the part of the respondent in this case that the children of these marriages are not legitimate, first, because under the interpretation of the laws of Maryland, including the Act of 1777, which recognize the capacity of a clergyman to perform the rites of marriage with the consent of the master, there was in point of fact no marriage; in other words, that by the law of Maryland recognizing

the possibility of a legal marriage under such circumstances *in facie ecclesiæ*, with the consent of the master, any other marriage between slaves was not regarded as a marriage so as to legitimate the issue; secondly, that the act of Congress of February 6, 1879, which does legitimate or professes to legitimate all the issue of such marriages, is unconstitutional and void, because it makes a discrimination between persons of different races and different colors.

In the first place it is not at all apparent that it ever was the law that a marriage *in facie ecclesiæ*, was necessary for the purpose of legitimating the issue. It is true that the Court of Appeals of Maryland in the last four or five years has decided that such was the law; but that decision is not binding upon us. It is laid down by Blackstone that a marriage *per verba de presenti* without the intervention of a clergyman is a legitimate marriage. And both Story and Kent say, that according to the universal understanding in this country a marriage *per verba de presenti*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage.

In the year 1844, that question was greatly contested in the case of *The Queen vs. Mills*, in the House of Lords in England, and by a divided court the judgment of the Irish tribunal was sustained, which had affirmed that a marriage *in facie ecclesiæ* was necessary to give legitimacy to the issue. That was, as we have said, by a divided court; and the opinion of Lord Campbell in the case, one of the ablest opinions that has ever been written, is a most powerful vindication of the ancient doctrine that a marriage, to be a valid marriage, so as to legitimate the issue, does not require the presence of a clergyman. He cites with marked emphasis and approbation the authority of Kent and Story as to the common law on this subject, certainly as it was uniformly understood in America.

It is not necessary for us to decide that question at this time. What has been said is merely by way of suggestion

in order to repel the conclusion that it has been definitively settled that the presence of a clergyman is necessary to validate a marriage so far as the legitimacy of the issue is concerned. It is sufficient for this court to rely, for the decision of the present cause, upon the act of Congress of 1879, which was made for the express purpose of relieving the unfortunate members of the late servile race from the consequences entailed upon them by their condition of servitude. The act of Congress is so emphatic and so comprehensive that it leaves no room for argument upon the question of the validity of the marriage now before the court. It provides:

“That the issue of any marriage of colored persons, contracted and entered into, according to any custom prevailing at the time in any of the States wherein the same occurred, shall, for all purposes of descent and inheritance, and the transmission of both real and personal property in the District of Columbia, be deemed and held to be legitimate and capable of inheriting and transmitting inheritance, and taking as next of kin and distributees according to law from and to their parents, or either of them, and from and to those from whom such parents, or either of them, may inherit or transmit inheritance, anything in the laws of such State to the contrary notwithstanding. 20 Stat. at Large, 282.

That is as broad and comprehensive as language can make it, stating in terms that wherever, according to a custom prevailing at the time the parties entered into and recognized themselves as occupying the relation of man and wife, it is sufficient for the purpose of legitimatizing the issue of colored persons. It was eminently proper and humane and just that the law should be made, and this court is unwilling to intimate the possibility of a doubt of the validity of the law in any respect. Certainly the suggestion that it violates any of the terms of the recent amendments of the Constitution of the United States can

have no warrant or force in reason or law. The proof having been adequate to show in this case—without reciting it in delivering this opinion—that these people did live in the relation of husband and wife, according to a custom then prevalent, and were recognized according to that custom as husband and wife, is sufficient to establish the legitimacy of the issue for the purposes of this cause.

We will only add, inasmuch as the defendant in the case does not seem to have any interest at all in the title which they were vindicating, that his objection to their title seems rather a litigious contention than one justly set up for the purpose of vindicating any rights of his own, that the court would not be disposed to scrutinize very closely the weight of the testimony introduced in this particular; but it is sufficient, and the court thinks that heirship has been established so as to entitle the plaintiffs to maintain their bill for partition in the premises.

WILLIAM A. MELOY, ASSIGNEE,

vs.

THE CENTRAL NATIONAL BANK ET AL.

The president of a corporation organized under Section 554 of the Revised Statutes relating to the District of Columbia executed without the authority or direction of the stockholders an assignment of all its assets for the benefit of creditors. *Held*, That the assignment was void not only because not made by authority of the stockholders, but it would *seem* also because a corporation has no power to make an assignment for the benefit of creditors.

In Equity. No. 10,296. Decided November 26, 1898.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree in equity dismissing a bill to obtain a discovery and account.

THE FACTS are stated in the opinion.

MR. WILLIAM A. MELOY for plaintiff:

The plea rests the defendants' case upon this single ground, viz:

That the deed of general assignment, though regularly executed and in due and sufficient legal form, "was not [previously] authorized by the said company by any vote of its stockholders or of its trustees or board of directors."

Than this one point the bank sets up no defense.

The bank, by its plea, admits that it was the agent, trustee, and depositary of the company.

That a balance of "from \$1,200 to \$1,500 moneys of said company were remaining on deposit" with it, besides commercial paper in its possession for collection.

That the deed of conveyance to the complainant was actually made, as set forth in the bill, in the name of the company, executed by its genuine corporate seal, duly delivered and the transfer accepted.

We need go no further in the record.

Equity Rule 28 says: If upon issue the facts pleaded be

determined for the defendant, they shall avail him as far as in law and equity they ought to avail him, *i. e.*, only so far.

Under this rule our point is in the nature of a demurrer to the plea, as if it were formally set down for hearing under this rule and we only say this plea states *no valid defense of which the bank can in law and equity avail itself*.

1. *It is not valid.* The defense rests on Section 544, R. S. D. C. This declares the persons named in a certificate of incorporation and their successors "by their corporate name capable of purchasing and conveying any real or personal estate whatever," "but [they] shall not mortgage such estate or give any lien thereon, except in pursuance of a vote of the stockholders of the company."

To this we reply, first, the conveyance in question is not a mortgage.

Second. It is an objection which the defendant bank cannot make. The provision of the statute is exclusively for the benefit of the stockholders of the company.

A mortgage is the conveyance of property by way of pledge for the security of a debt, which conveyance is to become void on payment of the debt. 4 Kent Com., 136; 2 Washburn on Real Estate, 36.

a. Here was no pledge. That is the bailment or transfer of the mere possession of property to be held until a debt is discharged or condition performed.

b. Nor retention of any title or interest whatever *in rem* to the grantor.

c. No defeasance or performance of any condition of pledge-holding.

In respect to all these, the essentials of a mortgage, this conveyance fails to meet the requirements of the definition.

The instrument in question is a full transfer of all title both legal and equitable in trust with contingent remainder to the grantor.

The grantee was by it vested with all title and interest

with power to sell and convey all and everything, and it is only in the net proceeds and the disposition thereof that the remainder corporation or its privies in estate or interest have any claim, direct or indirect.

The statute is not to be extended by construction to comprehend cases beyond the literal significance of its terms. Sedg. on Stat. and Cons. Law., 260.

2. The depositary bank is not competent to raise this provision of the statute to avoid discovery and payment over of the property in its hands.

3. But if all this were false reasoning, still the admittedly genuine seal of the corporation furnishes the evidence that it was lawfully impressed, and the deed the lawful act of the corporation.

"The contrary must be shown by the objecting party." Angell & Ames on Corp., Sec. 224, 11th ed.

The long continued, still unbroken, subsequent acquiescence of the stockholders, which may be inferred from silence as well as from overt acts, is proof of full authorization to execute the deed. *Howe vs. Wheeler*, 27 Conn., 538; Angell & Ames on Corp., Sec. 223, 11th ed.

4. Finally: Apart from statutory provisions there is no difference between corporations and individuals. It may, therefore, make an assignment.

"It has unlimited power over its property to pay its debts." 2 Kent Com., 10th ed., 398 and note. See, also, Angell & Ames on Corp., Sec. 691; *State vs. Bank of Maryland*, 6th G. & J., 205; *Reynolds vs. Starke County*, 5 Ohio, 205.

"By weight of authority which is irresistible (says Chancellor Walworth in 3 Barb., Ch. 119-124; affirmed in 3 N. Y., 238), a corporation has a right to make an assignment in trust for its creditors, and may exercise that right to the same extent and in the same manner as a natural person, unless restricted by its charter," &c. See, also, Burrill on Assign., 5th ed., Sec. 64, and many citations.

And it is now settled law that such general assignment

of assets does not transfer the franchise or operate as any extinguishment of the corporation. See *Burrill on Assign.*, 5th ed., Sec. 299, 64; *Story's Op.* in 12 *Peters*, 138.

Messrs. EDWARDS & BARNARD for defendant:.

Section 554, R. S. D. C., provides that a corporation organized under our law shall "be capable in law of purchasing, holding, and conveying any real or personal estate whatever, which may be necessary to enable the company to carry on its operations," &c., "but shall not mortgage such estate, or give any lien thereon, except in pursuance of a vote of the stockholders of the company." *Gashwiler vs. Willis*, 33 *Cal.*, 12; *Curtis vs. Leavitt*, 15 *N. Y.*, 9.

"A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted." *Weckler vs. 1st Nat. Bank*, 42 *Md.*, 581; *Bank of Augusta vs. Earle*, 13 *Peters*, 519.

It is doubtful whether this corporation could lawfully make the assignment in question by any method. *Burrill on Assign.*, Sec. 299.

A president of a corporation has no authority by virtue of his office to make an assignment of the assets of the company for the benefit of creditors. *Walworth Co. Bank vs. Trust Co.*, 14 *Wis.*, 325; *Crump vs. U. S. Mining Co.*, 7 *Gratt.*, 352; *Hoyt vs. Thompson*, 5 *N. Y.*, 320; *Gibson vs. Goldthwaite*, 7 *Ala.*, 281-292.

The deed in this case is not even signed by the company, but the president signs only his own name, and acknowledges it as his own act.

The presumptions, which in some cases are raised by such a deed, do not arise where the charter requires a previous vote, as in this case. *Johnson vs. Bush*, 3 *Barb. Ch.*, 207.

Mr. Justice BINGHAM delivered the opinion of the court:

The complainant states in his bill that from the 15th of September, 1885, to the 3d of June, 1886, his assignor, the

Anglo-American Insurance Company, transacted business with the defendant as its depository bank, delivering to it from time to time divers sum of money, as also bills, notes, checks, drafts, and so forth, for collection, in respect to all of which the bank engaged to act as a collecting agent of the insurance company, and to pay over and to account for all such collections to the company and to its assignees on demand; that on the 24th of June, 1886, the insurance company duly executed and delivered to the complainant its deed of assignment of all its assets, and the complainant accepted the same and entered upon the discharge of the trust thereby created, for the benefit of all the creditors of the company; that the complainant notified the defendant of these facts, and made the proper demand on its officers for an account and discovery of the assets in its hands; that the defendant neglected and refused to make such discovery or to account, and the complainant prays that the defendant be compelled to make discovery and to account, and asks for a decree for payment of whatever amount may be found in its hands.

To this bill the defendant filed his plea, denying that the complainant was legally the assignee of the Anglo-American Insurance Company, and asserting that the assignment was not the act of the corporation, nor authorized by a vote of its stockholders, trustees, or directors. A replication was filed and the case heard in the Court in Special Term, and a decree of dismissal of the bill rendered, from which the complainant appeals.

The issue presented is whether it was in the power of the insurance company, a corporation, to make this assignment. It is contended by the defendant that it could not; first, because by the provisions of Section 554 of the Revised Statutes of the District of Columbia it is provided that a corporation organized under this statute shall be capable in law of purchasing, holding, and conveying any real or personal estate whatever, which may be necessary to enable the

company to carry on its operations—but “shall not mortgage such estate or give any lien thereon except in pursuance of a vote of the stockholders of the company.”

It is argued by counsel for the complainant that the term mortgage or lien used in this statute cannot embrace a deed of assignment; that a deed of assignment is not the creation of a lien on property of the corporation within the meaning of this statute, and is not a mortgage.

We are inclined to believe otherwise. We think it is the creation of a lien upon the property of the corporation. The legal title is conveyed by this deed of assignment in trust for the specific purpose that the property may be converted into money for the benefit of creditors. We think, therefore, the assignment must be held to be void, because from the evidence it is clear there was not a compliance with the provisions of this statute. There never was any vote of the stockholders nor any meeting of the stockholders in relation to the making of an assignment. Indeed it appears from the evidence that the assignment was simply the act of the president. It does not appear that the trustees or directors of the corporation were consulted, or that they had any meeting whatever on the subject. The contrary is shown by the fact that the directors were scattered—all of them were absent in foreign parts at the time of and for quite a period anterior to the assignment. It is very clear outside of this statute, on general principles, that the president has no power to make an assignment unless he is ordered to do so by the directors of the company.

It is claimed, however, that two years have elapsed since this assignment was made, and that no complaint has been made by the stockholders or trustees, and hence their acquiescence in this act must be presumed and that this is sufficient. However that may be, at common law this deed of assignment without compliance with the terms of the statute cannot be validated by such acquiescence. But we are also inclined to think that this could not be so for

another reason, namely, the corporation itself has no power to make an assignment of its assets for the benefit of creditors. It so hampers itself in thus making a disposition of its property and its means for carrying out the purposes of its organization, that it amounts to a practical dissolution of the corporation. That is not one of the known methods by which a corporation may be dissolved and cease to do business. The way we apprehend for a corporation to surrender its charter is by a proper proceeding in a court of chancery, that surrender being made of course to the sovereign power which created it. Chancery has power to appoint a receiver to take charge of the assets and to do complete justice to the stockholders and the creditors of the concern.

We think there was no error in the decree of the court below in dismissing this bill, and it is therefore affirmed.

FREDERICK BATES

vs.

THE DISTRICT OF COLUMBIA.

1. The city councils of the city of Washington were deprived of every power over the streets of that city from and after the 25th of April, 1971, the date of the organization of the Board of Public Works.
2. A void assessment for street improvements is not validated by a mere request of the owners of the property to the Board of Public Works to revise the same, the Board never having had any legal connection with such assessment.
3. A tenant in common is entitled to have a legal incumbrance and cloud upon the common property removed at his own suggestion; it is not necessary to join his co-tenant in the proceeding.

At Law. No. 27,967. Decided January 14, 1889.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

PROCEEDINGS in *certiorari* to quash a special assessment for street improvements.

THE FACTS appear in the opinion.

Messrs. BIRNEY & BIRNEY for petitioner.

Mr. A. G. RIDDLE for defendant.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

This is a proceeding in *certiorari* to quash an alleged illegal assessment made against lots described as lots 2, 3, 4, 5, 6, 7, 16, and 17 in square 619, which the petitioner jointly with one William Bates has owned for twenty years last past. Square 619 is bounded on the north by New York avenue, on the south by M street, on the east by North Capitol street, and on the west by First street, all in the northwest quarter of the city. Lots 2, 3, 4, 5, 6, and 7 adjoin each other, and each has a frontage of 68 feet on M street. Lot 16 has a frontage on New York avenue of 250 feet 8 inches, and on North Capitol street, 239 feet 11 inches. Lot 17 fronts 86 feet on North Capitol street.

To the petition the District of Columbia has made a return.

It appears that on the 21st of February, 1871, the organic act, as it is called, relating to this District was passed, and the Board of Public Works created. On the 20th of April, 1871, by an amendatory act, the Board of Public Works was authorized by Congress to enter upon its functions as soon as the members should be qualified. On the 25th of April, 1871, the Board of Public Works, as shown by the return of the District of Columbia, held its first meeting and entered into the discharge of its functions as an organized body. On the 27th of April the city councils passed an ordinance by which they attempted to authorize the mayor to contract for paving and curbing the footways and gutters on two sides of square 619.

On the 8th of May the mayor instructed the city auditor to order the execution of this ordinance of April 27. On the 1st day of June, 1871, the organic act went into full operation. All the city offices were then abolished. On the 10th of August the legislative assembly passed an act prescribing the mode of assessment, &c., for special improvements by the Board of Public Works. On the 25th of September, E. L. Stanton, acting governor, approved an assessment on lots 1, 16, 17 and 18 for \$5,365.69. On the 6th day of October, 1871, E. L. Stanton, acting governor, approved assessment for \$4,083.35 on the remaining lots. The first two assessments were signed by William Forsyth, first assistant engineer of the Board of Public Works; the second by William Forsyth, as district surveyor, assistant engineer of the Board of Public Works, and superintendent and inspector, &c., and by Eugene Daly and Timothy Foley, Assistant Commissioners.

We only notice all these acts subsequent to the passage of the ordinance for the purpose of showing that the Board of Public Works, as a body, never took any part in this improvement, never passed any order in relation to it—

never formally, as a body, approved of any assessment or took any action in relation thereto.

By the organic act *upon the organization* of the Board of Public Works all of the legislative functions of the councils of the city of Washington ceased, and the Board of Public Works were authorized by the organic act to exercise the powers of the municipal corporation with reference to the streets. Complete and full control, care and custody of the streets and public grounds of the city of Washington, which had been exercised theretofore by the councils of the city of Washington was thereby conferred upon the Board of Public Works.

By the provisions of an amendatory act the Board of Public Works were to exercise their functions and to come into full power in relation to everything given to them by the original act as soon as the members of the Board were qualified. The return here shows that they were qualified and organized and began business on the 25th of April, 1871. It would follow that from that date the city councils of the city of Washington were deprived of every power over the streets of the city. They had no power to pass an ordinance for the improvement of any street or to authorize the mayor of the city to make any contract in reference to them on the 27th of April, 1871.

The contract, which was authorized by the mayor and subsequently made by the auditor, was utterly void because of want of power on the part of the councils to authorize it, or the mayor or the auditor of the city to enter into or execute any such contract. It will necessarily follow that all of the steps thereafter were null and void, and that no legal charge could be made against the property by any-body by reason of such proceeding.

It is claimed that this plaintiff subsequently asked for a revision of the assessments under the act of 1878, and that this amounts to a waiver upon his part of any irregularity or illegality that might have occurred before that time;

that, inasmuch as there was a re-assessment the re-assessment would be valid.

The original assessment having been made without any authority whatever, and being void absolutely, could not be given life years afterwards by the mere request of the owners of the property to the Board of Public Works, which never had had any legal connection with that assessment, as indeed no one else had, to revise such assessment. The authority of that board did not reach to the revision of an assessment of that character or to a merely pretended assessment. It was only such an assessment as had been made under the apparent forms of law and by a body who, at the time, had authority to make an assessment that could be revised under the act of 1878.

It is objected that this plaintiff shows that he is a tenant in common with another party, or joint owner of these lots, and that he should join his co-tenant with him in this petition.

We have considered the point and we think it may be, as suggested by counsel, that his co-owner, for some reason or other, would not join with him. But if the facts are true as stated in his petition and in the return, he having a distinct and valuable interest in this property, is entitled by himself to ask that the court shall remove this legal incumbrance and cloud upon his property at his own suggestion. He has an independent right and interest in the property which he as owner may protect.

We think this objection is not well taken and the assessment will be quashed.

HALLET KILBOURN ET AL.

vs.

JAMES M. LATTA.

Where defendant, one of a firm of real estate dealers, is decreed to account to his co-partners for profits made in joint operations with a third party in real estate without the knowledge or consent, and in fraud of the rights of his co-partners, and on such accounting complainants, by such evidence as they are able to obtain, trace into defendant's hands more than sufficient money derived from such operations to pay him for his share of the profits thereof, the burden is upon him to show by affirmative proof that as to certain of said operations he never received his share of the profits; and while it may be his misfortune it is no answer that he cannot now disclose and establish a full and complete account of the joint operations and of the adjustment of the accounts between himself and his illegal partner, so as to rebut the presumptions growing out of the evidence offered.

In Equity. No. 5919. Decided November 30, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

EXCEPTIONS to an auditor's report under a decree for an account.

THE FACTS are stated in the opinion.

Messrs. W. F. MATTINGLY and ENOCH TOTTEN for complainant.

Messrs. J. M. WILSON and W. D. DAVIDGE for defendant.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

In the case of Hallet Kilbourn and John F. Olmstead vs. James M. Latta, the complainants, Hallet Kilbourn and John F. Olmstead, state in their bill that in 1866 Hallet Kilbourn and John M. Latta entered into a co-partnership for the purpose of carrying on the business of real estate agents and brokers and the purchase and sale of real estate in the District of Columbia; that said co-partnership continued until the 1st day of January, 1872, when the same was dissolved; that during the existence of said partnership

a large amount of business was transacted by said firm, and a thorough knowledge of the nature, value, and titles of real estate, and the general business connected with the purchase and sale of real estate in said District was acquired by the said Kilbourn and Latta respectively; that on the 1st day of January, 1872, a co-partnership was entered into by the complainants, Kilbourn and Olmstead, with the defendant, Latta, for the purpose of carrying on the same business in the city of Washington. Kilbourn's interest was three-eighths, Latta's three-eighths, and Olmstead's two-eighths of the share of profits and losses.

It is in addition to this averred that during the existence of this co-partnership, namely, on or about the 1st day of December, 1872, the defendant Latta, without the knowledge or consent of the complainants, or either of them, entered into a secret agreement with one John Stearns, then a resident of the District of Columbia, by which it was agreed that said Stearns and the said defendant would engage in the business of buying and selling real estate in said District, Stearns to furnish the capital to be used in the business, and Latta to conduct the business and to furnish and use information, and so forth. This, it is charged, was a secret agreement entered into on the part of Latta with an intent to cheat and defraud the complainants, and with intent to disregard the partnership agreement with them, to betray the relation of trusts existing by said co-partnership agreement, and by operation of law; and to conceal from his co-partners, the complainants, the existence of this agreement with Stearns he requested each of his co-partners, respectively, not to converse with Stearns concerning the business of said Stearns, alleging as a reason for said request that Stearns was not friendly with them; also requesting Stearns not to mention the existence of the agreement to either Kilbourn or Olmstead, giving as a reason for said request that both Kilbourn and Olmstead were unfriendly toward him; all of which it is averred was false.

It is not necessary to further state the contents of the bill, which is quite lengthy.

The answer substantially takes issue with the averments of the bill, at least so far as any averments of fraud or secrecy is concerned, or any fact which would tend to show that the co-partnership of Stearns and Latta was illegal or in fraud of the rights of the complainants.

To the answer a replication was filed and testimony taken and the cause submitted to the court. The court, upon the issue joined, found in favor of the complainants, and ordered that Latta should account to the complainants for five-eighths of all of the profits received by him as a partner in the firm of Stearns and Latta, and referred the case to an auditor to state the account. The report of the auditor was made. To this report exceptions were taken by the defendant as to three items of the report only; as to that portion of the report in relation to lot 4 in square 282, as to the portion which relates to square 153, and as to the portion which relates to square 727.

We have carefully examined the testimony relating to these portions of the auditor's report to which exceptions have been filed. We are of the opinion that the auditor did not err in his conclusions in respect to the matters complained of. The special matter of complaint is directed to a statement of the auditor as to the burden of proof. In his report the auditor says:

"The terms of the opinion announced by the court in General Term, in passing upon the issue in this cause, seem to me to impose upon the defendant the burden of disclosing and establishing a full and complete account of the joint operations and of the adjustment and settlements of the accounts between himself and Stearns. It is his misfortune that he cannot now meet this burden of proof, and rebut the presumptions which arise against him."

It is claimed that this position of the auditor is erroneous, and to that erroneous position may be attributed his failure,

as is claimed by counsel for the defendant, to arrive at just and proper conclusions as to the several matters complained of.

We believe that the auditor was not in error in this conclusion. We think it is quite clear that upon the decree of the court, the court finding the averments of the bill to be substantially proved, and decreeing against the defendant that he should account to the complainants for their just proportion of the profits which he received from the firm of Stearns and Latta, it could only have been upon the ground that he had illegally and in fraud of the rights of the complainants contracted this relation with Stearns, and carried on this partnership business with him, whereby he realized profits; and that for these profits he must account. Under such circumstances he was bound to discover what profits he had made; to render an account of his doings as a co-partner with Stearns. Surely after the complainants had proved what money had come into the possession of Latta and Stearns—principally into the possession of Latta, because it was shown that he transacted nearly all of the business, made all of the purchases and sales and received nearly all the payments from the parties with whom they originally dealt—after they had shown, so far as they could, and so far as they were able by examination of the books of the parties—the books of Kilbourn and Latta, through whom some of this business was transacted, the bank books of the respective parties, Stearns and Latta, the checks, drafts used and drawn by them, and so forth, there yet remained, so far as could be discovered from an examination of all this data, an amount of money in the hands of Latta more than sufficient to pay to him his one-half of all of the profits realized by that firm in their transactions—we think it was incumbent upon the defendant Latta to produce affirmative proof of his assertion that he never had received his share of the profits as to the three transactions to which exceptions are taken, and which are now before us. This

he failed to do, and we think the auditor properly inferred from all of the circumstances of the case, applying the rule which he suggests to the evidence in the case, that Latta was to be chargeable with one-half of the profits in each of these instances.

We think there was no error either, in his finding that Latta should account for one-half of the profits in the transactions in regard to square 727, because it was shown that a portion of the proceeds of that transaction went into the purchase of square 242, which at the time of the commencement of this action, probably at the time of the hearing, so far as was known, had not been sold, for the reason that it was entirely immaterial what he did with these profits. Having shown that he realized profits from square 727, if he thought proper to invest them in other property he is not thereby excused from accounting to the plaintiffs for the same. Even if we suppose that his profits were invested in square 242, there is no reason to suppose, nor is there any showing of a loss of those profits, which it would be necessary to show if that became material. But the auditor found in this case that, so far as the profits realized by Latta in regard to square 727 are concerned, they were not re-invested in square 242; but enough money out of the proceeds of the sale of square 727 was retained by Latta to more than cover his share of the profits. We think that he was justified in this finding by the evidence in the case. There was a surplus of money from the proceeds of square 727, nearly \$10,000 over and above the cost of square 242; and the entire profit realized in the purchase and sale of square 727 was something less than \$10,000, the share of Latta being something less than \$5,000.

The exceptions to the auditor's report are overruled. The auditor's report is confirmed and the case remanded for further proceedings.

MARY HINDS

vs.

WARREN L. HINDS.

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1. A purchase of real estate with the joint means of husband and wife, and the placing of it in the wife's name imply a settlement by the husband upon his wife of the property to every extent that the consideration came from him, and the court will not, upon a divorce being granted the wife, disturb such a settlement, when voluntarily and fairly made before the cause of action arose on which the divorce was granted.
 2. Jackson *vs.* Jackson, 1 Mac A., 34, explained and distinguished.

In Equity. No. 10,833. Decided December 10, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree of divorce.

THE FACTS are stated in the opinion.

Messrs. WM. A. COOK and C. C. COLE for plaintiff.

Mr. FRANKLIN H. MACKEY for defendant.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

Mary Hinds filed her petition in the Equity Court against her husband, Warren L. Hinds, in which she sets out several matters as grounds for a divorce. Upon hearing in the Special Term and in this court only one ground was insisted upon, namely, willful abandonment.

The defendant answered her petition, denying quite generally the matters therein set forth. He also filed a cross-bill against the complainant, alleging adultery and praying a divorce from her for that reason.

This court, upon the hearing of the case, after the testimony had been introduced by the parties, respectively, relating to the grounds of divorce, announced to counsel that in its judgment the cross-bill of the defendant should be dismissed so far as it prayed for a divorce, and that the complainant should be granted a divorce upon the ground

of willful abandonment. It was thereupon insisted by counsel for the defendant that the court should nevertheless hear testimony relating to the property rights set out in the pleadings, and the court accordingly did hear the testimony relating to the property of the parties, and upon the consideration of the whole case we are now prepared to announce our conclusions.

It appears that after these parties were married a purchase of a lot in this city was made, and the same conveyed to the wife. On this lot a house was constructed. It is claimed by counsel for the defendant that the lot and the cost of the house were paid for out of the joint earnings of husband and wife. This is denied by counsel for the complainant. She claims that the house and lot both were paid for out of her separate means and money.

But we think, assuming that counsel for defendant is right in saying that the testimony shows that the payments were made out of the joint earnings of the parties, yet he has no right to recover any portion of this property.

It is claimed by counsel for the defendant that he is entitled, if the property was paid for by the joint earnings of the parties, to recover a fair proportion of it, notwithstanding he is not entitled to a divorce from his wife, and that she is entitled to one from him on account of his abandonment.

We think, under the circumstances shown in this case, that the purchase and deed to the wife imply a settlement by the husband upon his wife of the property to every extent that the consideration came from him or that the payments were made from his individual earnings. He would at common law have had control not only over his own earnings but those of his wife, and he would have had the right to appropriate the same to the benefit of his wife, to make a settlement of such earnings as well as any other sum of money over which he might have control upon his wife; and having done so, he cannot afterwards, because of

some connubial differences which may result in the separation of the parties and a divorce, rescind that arrangement and take back that or any part of that which he had previously voluntarily settled upon her permanently.

We are cited to a case where this court, under a statute then in force, held in a cause similar to this—that is, in a case where there was a cross-petition by the husband, and a petition on the part of the wife for a divorce, and where the divorce was refused to the defendant, the husband, and granted to the complainant, the wife, that the property should be divided where the evidence seemed to be, as the court found, that it had been paid for out of the joint earnings of the parties. But that was upon a different state of the law from that which we now have. That decision was not based upon any equity power which the court possessed, but claimed to be authorized by statute. That was the case of *Jackson vs. Jackson*, 1 Mac Arthur, 34. The statute then authorized the court to restore to the wife all her separate property that she had at the date of her marriage, and that she could retain her dower, that the court might restore to her the whole, or any part of her separate property, however acquired.

It is sufficient to say as to that statute, probably, that in the revision of the statutes, the clause giving the court power to restore to her all of her separate property, or any part of it, was dropped out, and that, after the cause of action accrued in the case of *Jackson vs. Jackson*, Congress passed the act in relation to married woman's separate estates. We need refer to that act only to say that it entirely changed the character of a married woman's separate estate. These two acts of legislation, taken in conjunction, having occurred after the decision in the case of *Jackson vs. Jackson*, and before the cause of action in favor of the plaintiff, or the claimed cause of action in favor of the defendant, in this case, entirely changed the rights of the parties and takes away the power, which this court in deciding that case assumed to derive from the statute.

But, further, it would be enough for us to say in regard to *Jackson vs. Jackson*, that it was appealed to the Supreme Court of the United States, and was there reversed on the ground that there was no such power in the court as was claimed by the decision in that case. *Jackson vs. Jackson*, 91 U. S., 122.

We think the statute, as it was at the date of the decision in *Jackson vs. Jackson*, in this court, did not authorize the court to disturb a settlement voluntarily and fairly made by a husband upon his wife after marriage and before the cause of action arose on which the divorce was granted. But as the law now stands all pretext for such holding is removed. That being true, we cannot grant the prayer of defendant, asking that a part of this property shall be given to him. We dismiss the cross-bill, and grant a divorce to the complainant on the ground of willful abandonment.

This is an affirmance of the decree below.

EDWARD F. DROOP

vs.

HENRIETTA C. METZEROTT ET AL.

Where executors have settled their estate, but retain control thereof as trustees under the will, in a suit in which judgment must be rendered for or against them as such trustees, and not as executors, either party may testify; such a suit is not within the provisions of Section 858 R. S. U. S., and Section 876 R. S. D. C.

Equity. No. 9,529. Decided December 10, 1888.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree of the Special Term on a bill for an account.

THE FACTS are stated in the opinion.

MR. A. C. BRADLEY, for complainant:

The complainant was examined as a witness in his behalf, and objection was made to his competency under Sec. 858, R. S. U. S., and the case of *Page vs. Burnstine*, 102 U. S., 644.

The exclusion of the act referred to only applies "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them." With that exception only, and strictly, Sec. 876, R. S. D. C., renders the parties to suits, and all persons interested therein, competent and compellable witnesses, who are not within the exceptions named in that section.

Although the defendants, Cross and Mrs. Metzertott, are styled in the bill executors and trustees, yet they have no interest in the suit as executors. No judgment can be rendered in this cause for or against them as executors, and they are interested under the will of W. G. Metzertott herein only as trustees. By the evidence in the cause it appears that the executors settled their first and final account in the Orphans' Court, November 10, 1885, and distributed to themselves as trustees, so that, after that event, they held

the entire estate as trustees. As executors they had and have nothing to do with real estate. *Seegar's Exrs., vs. State*, 6 H. & J., 162; *State vs. Chester*, 51 Md., 377; *Kirby vs. State*, 51 Md., 392.

Messrs. ENOCH TOTTEN and A. J. FERGUSON for defendants:

The attitude and character of the parties before the court places them within the operation of a well-known rule of evidence. Mrs. Metzertott is the executor of the last will and testament of her deceased husband. The complainant Droop is pressing for what is equivalent to a judgment against the estate. Manifestly, Congress felt that the general rule, permitting parties to testify on their own motion, was disadvantageous to the representatives of deceased persons. *Page vs. Burnstine*, 102 U. S., 664; *Mutual Life Ins. Co. vs. Watson*, Adm., 30 Fed. Rep., 653.

The spirit and the reason of the statute is to prevent injustice and to exclude the testimony of either party as to any transaction with or statement by the testator, because the testator's lips are closed in death. See *Page vs. Whidden*, 59 N. H., 507-511; 1 Atl. Rep., 1, 5.

Several of the States have statutes rendering parties to the record incompetent to testify as to any contract or transaction with a deceased person.

The Supreme Court of Indiana has decided—

"Where rights are claimed through a deceased person, parties to the record are not competent witnesses to prove a contract or transaction with the deceased." 8 N. E. Rep., 559.

In Michigan the surviving party to a contract is not a competent witness as to the matters between himself and the deceased party upon which such deceased party if still living could have testified himself. 27 N. W. Rep., 514.

The Minnesota statute renders the surviving party to a contract an incompetent witness as to conversations with or admissions of the deceased party. *Harrington vs. Samples*, 30 N. W. Rep., 671.

It is submitted that the complainant, Droop, as the sur-

viving partner of the testator of the defendants, Henrietta C. Metzertott and Samuel Cross, is not a competent witness under our statute to testify as to any transaction with or statement by the deceased.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

The complainant filed his bill in this cause as surviving partner of the firm W. G. Metzertott & Co., against the widow, heirs at law, and trustees under the will of his deceased co-partner, William G. Metzertott. The purpose of the suit is the sale and distribution of the proceeds of certain assets of the late firm, consisting of promissory notes and stock, and of certain real estate, standing partly in the name of the complainant, partly in the name of his deceased partner, and partly in the name of both.

The bill alleges that the real estate referred to is part of this property, and belongs in equal interest to complainant and the estate of his deceased partner; that Metzertott left a last will and testament, by which the title to such of said real estate as was vested in him alone, or in him and complainant jointly, passed, by a general clause covering all of his real estate, to his trustees, defendants Cross and Henrietta C. Metzertott, subject to an apparent right of dower in his widow, and therefore, to that extent, the partnership matters could not be settled without the intervention of the court.

The controversy on this hearing relates entirely to the real estate, and only to three parcels. In the answers of the parties, they say that the complainant is entitled to the relief which he asks with reference to all the property except the three pieces of real estate to which we will refer.

As to two of these, at the death of William G. Metzertott the title was in him, and as to the other the title was also in him, but as to that there is no claim upon the part of the complainant that the fee simple belonged to the partnership, but only that the partnership had constructed a

stable on this lot, and that he, as the surviving partner, was entitled to realize his interest in an alleged ownership of the stable which had been constructed and placed upon the lot by the firm.

The answers of the trustees and of the heirs, probably more for want of knowledge than otherwise, allege that all the real estate in the name of William G. Metzerott, at the date of his decease, belonged to him individually, and that the firm of Metzerott & Co. had no interest in it.

Evidence has been taken as to the ownership of the three pieces of property, and we think it conclusively shows that all of them were, at the date of the death of Metzerott, partnership property except the lot upon which the stable was built, and that the stable was built with partnership funds, for the use and benefit of the firm. We find that in the accounts stated by Metzerott & Co. for some years before the dissolution of the firm by the death of Metzerott, and in their annual accounts-current the three parcels now in dispute were treated as partnership property and as belonging one-half to each of the partners. This is especially true in reference to the stable, and we find nothing in the record or in the testimony which would seem to refute the proof thus suggested by the books of the parties. Droop, the surviving partner, testifies that two of the parcels in dispute were owned by the firm at Metzerott's decease, and that the stable on the other was built, paid for, and used by the firm until the death of Metzerott.

It was objected on the hearing that Mr. Droop was not a proper witness; that he was excluded from testifying, under Section 858 of the Revised Statutes of the United States, and by Section 876 of the Revised Statutes for the District of Columbia. But the provision of the last act is that all persons interested in suits are competent witnesses and may be compelled to testify, with an exception that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall testify.

In this case it is true the bill refers to the defendants, Cross and Metzertott, as executors and trustees; but it is perfectly evident from the facts stated in the bill, and not denied in the answers, as well as from the averments in the answers, that this is a suit between the complainant and the defendants as trustees and not as executors. No judgment could be rendered for or against them as executors. It is shown that the estate of William G. Metzertott has been settled by the executors. They have filed their final account in the Orphans' Court, and the sum found in their hands has been distributed to themselves as trustees. Hence they have the control of this estate as trustees, not as executors. We think, therefore, that Droop is not excluded from testifying by the terms of the statute to which we have referred, and that he is a competent witness.

The court in Special Term ordered that the stable in question be sold at public sale, the purchaser to remove the same within thirty days from the date of sale, the proceeds to be equally divided between complainant and the widow. The stable was built with the consent of the owner by this partnership, and for the partnership use, the legal and equitable title to the lots being in Metzertott. It is a brick stable and manifestly intended to be a permanent addition to and betterment of the estate. We think the plaintiff is entitled to an ascertainment of the present value of the stable, to the owner in fee simple, and that he should have credit for one-half of that value in the settlement of his account in this case as the surviving partner of the firm.

For the purpose of ascertaining this fact, and possibly for the purpose of determining one or two other matters relating to rents, if since the death of Metzertott not already disposed of in the court below, the case will be remanded, and the decree of the court below modified as to the stable in accordance with this opinion.

JOHN C. McCLELLAN

vs.

THE DISTRICT OF COLUMBIA.

1. An assessment for street improvements is void when the description of the property is so unintelligible that the court cannot ascertain the premises charged with the assessment.
2. Where the lots claimed to be assessed are lots 41 and 42 of square 69, and the description is "of 41 and 42," it is unintelligible and void.
3. Where an assessment contains charges not authorized by law it is to that extent void.
4. So, where the amount intended to be assessed is given in figures only, with no mark to indicate the value represented by the figures, the assessment is void.
5. *Bensinger vs. The District, 6 Mackey, 288, and Walker vs. The District, 6 Mackey, 355, affirmed.*

At Law. No. 27,534. Decided January 14, 1889.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

PROCEEDINGS in *certiorari* to quash a special assessment for street improvements.

THE FACTS are sufficiently stated in the opinion.

Messrs. BIRNEY & BIRNEY for petitioner.

Mr. A. G. RIDDLE for defendant.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

This is a petition by the plaintiff to quash the assessments laid upon lots 41 and 42 in square 69, of which he claims to be the owner. The lots are bounded on the east by Twenty-first street, and front on Twenty-first street 22 feet and 6 inches.

In the assessment upon this lot the description is "of 41 and 42." In *Bensinger vs. The District of Columbia, 6 Mackey, 288*, it was held that such a description was not so intelligible as to enable the court, or any one, to ascertain the premises upon which the charge was made, and consequently that an attempted assessment on premises by such a description was illegal and void.

It would appear also that the ordinance authorized curbing, paving, and guttering only, and that when making the assessment, grading and materials were added, and charges were added for cobblestones and gutter-stones.

These, it appears, were payable at the time out of ward funds, and were not the subject of assessment against the property, and to the extent of the same the assessment would for that reason be invalid. So held in the case of Walker and Simmons vs. District of Columbia, 6 Mackey, 355.

Again, the amounts are given in figures only. No mark is connected with the figures, so that any one can determine whether or not values are represented.

This court held in Walker vs. District (*supra*) that where an assessment was made and no values were given in writing, or in figures, intelligently connected with a proper dollar-mark or other indication of value, that no addition would be made by the court, and that the assessment would be quashed. Bensinger vs. District, 6 Mackey, 285.

For these reasons this assessment will be quashed.

WINDSOR & FORD

vs.

THE DISTRICT OF COLUMBIA ET AL.

1. The second section of the act for the government of the District of Columbia, approved June 20, 1874, prohibits the District Commissioners from making contracts for new street improvements.
2. The Commissioners had no power to authorize a contractor to improve a street and square not included in his contract made before the approval of said act, "in lieu of similar work" which he was bound to do on a different street and square.
3. An "extension" contract containing such authority was void, and no valid special assessment or tax-lien certificate could be based thereon.
4. A property owner who, under the permission of the Act of June 19, 1878, made complaint of a special assessment, is not estopped thereby from contesting its legality.
5. A void assessment cannot be revised.

At Law. No. 27,929. Decided January 15, 1889.

The CHIEF JUSTICE and Justices JAMES and MONTGOMERY sitting.

HEARING on *certiorari* brought to procure the annulment of certain special assessments of taxes by the District of Columbia against the petitioner's property.

THE FACTS are sufficiently stated in the opinion.

Messrs. BIRNEY & BIRNEY for petitioners.

Mr. A. G. RIDDLE for respondents.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

In this *certiorari* proceeding we are asked to "quash and annul" certain "alleged special assessments," and tax-lien certificates which rest upon lots numbered consecutively 23 to 32, both inclusive, in square numbered 651, all of which lots front eastward on South Capitol street, between M and N streets, in this city.

The record discloses that at some time prior to June 20, 1874, repairs and improvements were being made upon First street, northwest, and among other points on said street between and M and N.

This work was being performed under a contract theretofore made by one Burch with the Board of Public Works.

At that date the act of Congress which abolished the Board, and provided for Commissioners in its stead, was approved. 18 Stat. at Large, 116.

This act declared that the Commissioners should "make no contract * * * other than such * * * as might be necessary * * * to the protection and preservation of improvements [then] existing or commenced and not completed."

June 9, 1876, a contract was entered into between the Commissioners, on behalf of the District, and Mr. Burch, in which it was agreed that the contractor should "complete the work * * * of First street" at the points other than the one between M and N streets, and that he should also "set the curbs" and lay the pavements on the carriage-way of South Capitol street between M and N streets south, *in lieu* of similar work, which was and has been done on First street west between these points."

This work was completed during the same summer. At that time Messrs. Windsor & Ford were, and ever since have been, the owners of the lots above mentioned.

In December, 1876, the assessments complained of, which aggregated \$918.12, and were all for carriage-way, were laid against these lots, of which levy due notice was given.

Petitioners were not satisfied with this levy, and on the 18th day of July, 1878, in pursuance of the act of Congress, approved on the 19th day of the preceeding month (20 Stat. at Large, 166), they complained to the Commissioners and requested a "revision of the assessment against said property," which revision was soon thereafter, at what precise date does not appear, attempted. This "revision" exhibits a total of \$158.71 for sidewalk, of \$152.13 for curbing, and \$549.30 for carriage-way; aggregating, as so revised, \$882.17.

It is urged by petitioner's counsel that the contract of June 9, 1876, was not only unauthorized, but that it was expressly forbidden by the Act of June 20, 1874.

That the original assessment was therefore invalid, and

that the so-called "revision" was void because of no original valid levy upon which it might be predicated, because of omissions and informalities, and because it included items other than an assessment for "carriage-way."

Counsel for respondent insists, in reply:

First. That the work which was so done on South Capitol street, between M and N, was really a completion of the work theretofore begun on First street; and

Second. That even if it were *not*, petitioners are estopped from complaining of an assessment which they themselves asked to be revised, and from complaining of the revision so induced.

The Act of June 20, 1874, forbade the making of any contracts for such improvements as are involved here "other than such * * * as might be necessary * * * to the protection and preservation of improvements [then] existing, or commenced and not completed."

It is not claimed that the work on South Capitol street was "necessary to the protection and preservation of any antecedent work, nor was it a continuation of any work existing or commenced and not completed." The old work was abandoned and the work on South Capitol street was a new, another and different undertaking.

Indeed, the contract itself declares that it was "in lieu of *similar work* which was to have been done on First street." We think, therefore, that the contract for the performance of this work on South Capitol street was unauthorized and void.

It must follow that the levy of the assessment was invalid.

Now, are petitioners at liberty to contest the validity of the "revision." We think they are.

The original assessment was not merely irregular and informal—it was actually void. Being void, it could not be "revised and corrected," for there was nothing to revise. It is as unwarranted in law as though petitioners had invited a levy, as a mere gratuity, and one had thereupon been laid.

The assessment cannot be maintained, and the proceedings must be quashed. Judgment accordingly.

WILLIAM W. DANENHOWER
vs.
THE DISTRICT OF COLUMBIA.

1. After a special assessment for a street improvement has been paid, the District Commissioners have no power to assess a second time because of a mistake made in the amount of the original assessment.
2. Such special assessment is extinguished by payment, even though made by a person who does not own the property assessed.
3. The act of Congress of June 19, 1878 (20 Stat., 166), authorizes the revision and correction of assessments complained of as "erroneous or excessive," but it confers no authority to impose, voluntarily and in the absence of complaint, another, a different, and a much larger levy.

At Law. No. 27,862. Decided January 15, 1889.

The CHIEF JUSTICE and Justices JAMES and MONTGOMERY sitting.

HEARING on *certiorari* brought to procure the annulment of certain special assessments of taxes by the District of Columbia against the petitioner's property.

THE FACTS are sufficiently stated in the opinion.

Messrs. BIRNEY & BIRNEY for the petitioner:

1. The record shows that notice was not given to the owner as required by the legislative Act 9 of August 10, 1871. *Bensinger's Case*, 6 Mackey, 285.

2. The payment of the original assessment by Mrs. Follen extinguished it, although she was not the owner of the property. See 9 Wall., 326; 18 Wall., 549; 3 Page, 117; 23 La. Ann. Rep., 84; 14 Grat., 148; 3 Pa. St., 105; 73 Pa. St., 467; 17 Pa. St., 42; 20 Pa. St., 157.

3. The alleged revision was illegal for two reasons: First, the assessment had been paid; and, second, no complaint had been made of erroneous or excessive charges in the original assessment, and the Commissioners were without power to revise. See Act of Congress of June 19, 1878, relative to special assessments.

Mr. A. G. RIDDLE, for the respondent, filed no brief.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

Danenhower filed in the Circuit Court his petition, praying that a writ of *certiorari* should issue commanding the respondent to certify to that court its proceedings relating to a certain special tax assessment theretofore attempted to be levied upon lot number 6 of square number 556 in this city.

The petition asserted the invalidity of the assessment, and asked that "upon the coming in" of respondent's return "the said alleged special assessment or the revisions and corrections thereof" might be "quashed and annulled."

The return was filed in due time, whereupon, on request of counsel for the respective parties, the cause was certified here for hearing in the first instance.

The material facts are as follows: In pursuance of an act of Congress, approved February 21, 1871, providing for a Board of Public Works in the District of Columbia, and empowering such Board, among other things, to assess upon property adjoining and specially benefitted by local improvements a reasonable proportion of the cost thereof, 16 Stat. at Large, Sec. 37, 426. The legislative assembly of the District of Columbia, on the 10th day of August in the same year, enacted a statute, in Section 1 of which it was declared in substance that whenever any such improvements were so made and completed a statement of the cost should be prepared by the Board and filed in its office, and that "immediately thereafter an assessment based upon said statement" should be made and collected.

Section 3 of this enactment provided that in case of failure to pay the amount so assessed upon any particular parcel, after due notice, the Board of Public Works should issue a certificate of indebtedness for the amount thereof, which certificate should bear interest at 10 per centum per annum until paid, and should encumber the property as a lien, and that upon the expiration of a year thereafter the

premises might, on the application of the holder of the certificate, be sold and deeded to the purchaser.

During the following summer that portion of Third street "from Indiana avenue to New York avenue in front of [said] square 556," was graded and otherwise improved.

The entire cost of the work was about \$131,000, one-third of which was to be assessed on the property "fronting along the line of the improvements."

Lots 5 and 6 of this square both abutted on that portion of the street so improved.

Mary E. Follen then owned lot 5, and lot 6 was then and ever since has been the property of Mr. Danenhower in fee.

The proportionate share of lot 5 of the assessment to be so laid was \$164.50, while that of lot 6 was \$358.02, but by mistake these amounts were transposed, and the larger sum was assessed against lot 5 and the smaller against lot 6.

The larger amount has never been paid. And so, on November 1, 1872, lien certificate No. 833 was issued for \$358.02, and in which it was declared that this was the amount "assessed upon lot No. 5 in square No. 556."

During the following month Mrs. Follen, in ignorance of the error in these assessments, paid the smaller sum, which all concerned supposed to be laid against her lot. June 20, 1874, Congress abolished the Board of Public Works (18 Stat. at Large, 116), and June 11, 1878, the present District Government was established. 20 Stat. at Large, 102.

Five days later Congress passed an act directing the collection of "all assessments for special improvements," which had been made in pursuance of the assembly act of August, 1871. 20 Stat. at Large, 166.

This last act of Congress provided that "Upon complaint being made to the Commissioners, within thirty days from the passage of the act, of erroneous or excessive charges, in respect to any of said assessments which remained unpaid," they [the commissioners] were authorized to "revise such assessments so complained of and to correct the same," and

that where "certificates of assessments had been issued," they [the commissioners] should "issue to the holder of such certificate a drawback certificate for the amount of such erroneous or excessive charges."

Thereafter and during the year 1878, but at what particular date does not appear, the District Commissioners attempted to revise the assessment upon lot 6, by raising the amount of the erroneous assessment of \$164.60 to the sum of \$379.32.

In December, 1883, the "Chief of the Special Assessment Division" in the office of the Commissioners, notified petitioner of the error which had been made in the assessment of the two lots, at the same time leaving with him a bill for this increased amount, with interest at 10 per centum, to be computed from the 1st day of November, 1872. On the 6th day of the following February, this bill not being paid, lien certificate No. 19,977 for the sum of \$358.02, "with interest at the rate of ten per centum per annum from the 1st day of November, A. D. 1872," was issued and is now outstanding.

Upon this certificate there was written across the face "issued in lieu of certificate No. 833 recalled as erroneous, in designating the lot therein described as number five."

The first question, therefore, for our consideration is as to this attempted revision.

Can it be upheld?

It will be remembered that the act of Congress of June, 1878, authorized the revision and correction of "excessive or erroneous charges" [assessments] in cases where complaint was made to the Commissioners within thirty days "from the passage of the act."

It is not asserted in this case that complaint was ever made by the owner of lot 6, and we think it may be safely assumed that he did not find fault with a levy of \$164.50 as "excessive or erroneous," when it really should have been \$358.02.

That which was done, therefore, instead of being a "revision and correction" of an "excessive or erroneous" assessment, undertaken upon complaint of the owner of the property, was in fact another and a different assessment—an attempt to encumber the property in controversy with a much larger levy which had rested for several years upon another lot and without the request or consent of the owner.

Surely the Statute of 1878 does not admit of such a construction.

It is plain, we think, that this so-called revision was, at least to the extent of the amount of the increase over the original assessment, a new levy, *ultra vires*, and void.

If it be said that still the first assessment of \$164.50 is valid, and is separable from the amount added, it must be replied that this levy was long ago paid. It was paid as it was assessed, and it was assessed upon lot 6. .

It follows that none of this assessment for which the last-mentioned certificate was issued now rightfully rests upon lot 6, and the proceedings must be quashed.

In reaching this conclusion we have purposely omitted the consideration of the many other interesting questions discussed at the argument.

Judgment accordingly.

THE UNITED STATES

vs.

JAMES C. ELIASON.

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1. An indictment under Section 5467, R. S. U. S., charging the accused with having in his possession a letter containing five certificates, each "being of the deposit of one silver dollar *with the Treasurer of the United States*" is sufficient, although upon the certificates themselves the words "in the Treasury" are used.
 2. When a witness is cross-examined upon a matter not directly bearing upon anything brought out on the examination in chief, it is within the discretion of the justice trying the cause to determine how far such cross-examination shall be allowed.
 3. Where the portion of the charge excepted to, if taken literally, gives no point to the exception, the language of the court will be so construed as to give it a meaning consistent with the general tenor of the whole charge.
 4. Whether Section 803, R. S. D. C., which enacts that it shall not be necessary that the justice trying the cause shall sign and seal this exception, applies to criminal cases *quaræ*.

Criminal Docket. No. 16,902. Decided January 21, 1889.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

MOTION for a new trial on a bill of exceptions taken on the trial of an indictment under Section 5467, R. S. U. S.

THE FACTS are stated in the opinion.

Mr. RANDOLPH COYLE for the United States:

The indictment does not purport to give the tenor of the certificates, as in forgery, nor is this necessary. It charges a statutory offence, in the words of the statute, and, in addition, charges certain facts with ample particularity, so that the defendant is advised of the identical violation of the law with which he is charged. This is sufficient. U. S. *vs.* Gooding, 12 Wheat., 460; U. S. *vs.* Britton, 107 U. S., 655; U. S. *vs.* Mann, 95 U. S., 580; Cannon *vs.* U. S., 116 U. S., 55.

The second exception is to the exclusion of a certain question put on cross-examination to one of the witnesses for the

prosecution, not tending to the enlightenment of the merits of the case, but obviously designed to affect the credibility of the witness. The admission or exclusion of such a line of cross-examination was a matter resting in the discretion of the court below, and error cannot be predicated of the exercise of that discretion. *Johnston vs. Jones*, 1 Black, 209; *Lea vs. Missouri*, 17 Wall., 532.

Mr. H. E. DAVIS for defendant:

Where an indictment professes to set out a written instrument by its tenor, the proof must conform strictly thereto. 1 Bish. Crim. Prac., 488.

The illustrations of this rule are practically innumerable. For examples see *Com. vs. Ray*, 3 Gray, 441; *Zellers vs. State*, 7 Ind., 659; *Sharley vs. State*, 54 Ind., 168.

In an indictment for receiving Treasury notes of the United States stolen from the mail, one of the notes was described as bearing interest of 1 per centum, and a note was offered in evidence bearing interest of M per centum. It was held that the letter M was a material part of the note, and that if it meant something different from 1 the variance was fatal. *U. S. vs. Hardyman*, 13 Peters, 176.

Mr. Justice HAGNER delivered the opinion of the Court:

The traverser was indicted under Section 5467 of the Revised Statutes of the United States, the first portion of which declares that—

"Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters * * * containing any note, bond, draft, check, warrant, revenue stamp, &c., &c.," shall be punished in a certain way, and then says:

"Any such persan who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either *in the course of his official duties or in any other manner whatever*, and provided the same shall not have been delivered to the

party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The first count of the indictment states that the defendant was employed as a clerk in the postal service of the United States, at Georgetown, on the 9th of November, 1887, and that at that date "there came into the possession of him, the said James C. Eliason, in the regular course of the official duties of him, the said James C. Eliason, as such clerk, as aforesaid, a certain letter, which said letter was then and there inclosed in a certain envelope bearing a direction of the tenor following; that is to say—

"Master JNO. H. O'NEAL, Student,

" Georgetown College, Washington, D. C."

which said letter was then and there intended to be conveyed by mail, and which said letter then and there contained five certificates of the Register of the Treasury and the Treasurer of the United States; each of said certificates being of the deposit of one silver dollar *with the Treasurer of the United States*, payable to the bearer of such certificates on demand; each of said certificates being of the value of \$1 of the lawful money of the United States, which said letter had not at the time it so as aforesaid came into the possession of the said James C. Eliason been delivered to the party to whom the same was directed."

The second count of the indictment is not important.

The first exception, after setting forth the evidence adduced to establish the several averments of the indictment as to the employment of the traverser as postal clerk, and the means adopted by the detectives to detect the thief, in consequence of repeated losses in the Georgetown office of letters addressed to students at Georgetown College, states that a decoy letter was dropped in the post-office at Georgetown, addressed to O'Neal, which was not delivered to him, and that the detectives arrested the traverser at the post-office, and on searching him found in his pocket-book a note,

known as a silver certificate, which they had marked and placed in the decoy letter. And the United States then produced the marked note, identified as that found on the person of Eliason, and which reads in this way :

"This certifies that there has been deposited in the Treasury of the United States one silver dollar payable to bearer on demand.

"Washington, D. C.

"C. A. JORDAN,
"Treasurer of the U. S.

"W. S. ROSECRANS,
"Register of the Treasury."

On the reverse are the words "United States silver certificate," and offered it in evidence to sustain the charge in the indictment.

These silver certificates were first authorized by the act of Congress of February 28, 1878 (20 Stat., 25, 26), Section 3 of which reads as follows:

"That any holder of the coin authorized by this act may deposit the same *with the Treasurer or any Assistant Treasurer of the United States*, in sums not less than \$10, and receive therefor certificates of not less than \$10 each, corresponding with the denominations of the United States notes. The coin so deposited for or representing certificates shall be retained *in the Treasury* for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be re-issued."

On the 4th of August, 1886, a supplementary law was passed. The first act did not say what officer should issue the certificates, but the Act of 1886 (24 Stat., 222), says:

"The Secretary of the Treasury is hereby authorized and required to issue silver certificates in denominations of one, two, and five dollars, and the silver certificates herein authorized shall be receivable, redeemable, and payable in like manner and for like purposes as is provided for silver

certificates by the Act of February 28, 1878, * * * and denominations of one, two, and five dollars may be issued in lieu of silver certificates of larger denominations in the Treasury."

The defendant objected that the note was not admissible in evidence, because it was not "a certificate of the deposit of one silver dollar with *the Treasurer* of the United States," as alleged in the indictment; but, on the contrary, it certified "that there has been deposited *in the Treasury* of the United States one silver dollar payable to bearer on demand; and this, it was insisted, constituted a variance between the averment and the offer. The court below overruled the objection and admitted the note in evidence.

It is insisted here that, as *the Treasurer* of the United States is not *the Treasury*, a deposit *with the Treasurer*, is not the same as a deposit *in the Treasury*—that the Treasury consists not only of the vaults at Washington, but also comprehends the vaults of the Government depositories in different places throughout the country, as the various sub-treasuries, the mint at Carson City, the depository at Boise City, &c., and that it might well be that the money stated in the certificate offered in evidence to have been deposited *in the Treasury* of the United States, may have been deposited in any one of these other depositories, instead of with "*the Treasurer* of the United States" as charged in the indictment; and that the indictment should have specified in which of these several places the deposit named in the certificate offered in evidence had in fact been made.

We do not concur in this argument. Whatever silver might be deposited *in the Treasury of the United States*, as the basis of these silver certificates, was in contemplation of law, deposited *with the Treasurer*; and whatever silver was deposited with the Treasurer, or any Assistant Treasurer, was, *ipso facto*, deposited *in the Treasury*, where the Act of 1878 expressly says: "It shall be retained for the payment of the certificates on demand;" and for all the purposes of

the act we conceive that the certificate offered in evidence was sufficiently described in the indictment. But the certificate itself, declaring that the money has been deposited *in the Treasury*, is signed by Mr. Jordan, *the Treasurer*, and is therefore a sufficient declaration by him that this money had been deposited with "*the Treasurer* of the United States."

If the argument for the traverser were tenable, it would be requisite that each dollar certificate should contain a statement of the particular depository where the corresponding dollar in silver had been deposited—an impracticable requirement. Whatever silver is received by the Treasurer, or any of his subordinates, goes into the Treasury forthwith and cannot remain in the personal possession of the particular officer who receives it for an instant; for he is obliged by law to deposit it in the Treasury of the United States at the very moment he receives it. No person can pay any money to the Treasurer or any of the subordinate depositaries for public account, without, *ipso facto*, paying it *into the Treasury* of the United States. And there is no way in which any money can be deposited in the Treasury, except by paying it to the Treasurer or to one of the aforesaid subordinate depositaries. We think the expressions *Treasurer* and *Treasury* in these acts are used interchangeably. Besides, the indictment does not undertake to set forth the statute by recital, or even to state its tenor; but simply states, by way of description, "each of said certificates *being* of the deposit of one silver dollar with the Treasurer of the United States." For these reasons we think the certificate was properly admitted in evidence.

In the case of *U. S. vs. Hardyman*, 13 Peters, 176, to which we have been referred as supporting the objection, the traverser was indicted for receiving a stolen note, knowing it to have been stolen; described in the indictment "as a promissory note called a Treasury note for the payment of \$50, with interest at the rate of 1 per centum." On the

production of the note in evidence, it was found that instead of the words "with interest at one per cent.," the language of the note was, "with interest at M per centum." It was moved to exclude the note from the jury for variance; and in the Supreme Court of the United States (to which the case was certified on division of opinion), one of the points considered by the court was: "Would it be proper to receive parol evidence for the purpose of explaining the meaning of the letter M and proving the practice and usage of the Treasury Department and officers of the Government, &c., in order to show the meaning attached to the letter M, and that by such meaning the Treasury note bears 1 mill per cent. interest, and not 1 per cent. interest."

In speaking to this point, they say:

"We think, under the circumstances of the case, that parol proof may be received to show the meaning and effect of the letter M as inserted in the body of the note; and if such evidence shall establish a substantial variance between the note described in the indictment and the one offered in evidence, it must be fatal to the prosecution, whether such evidence be submitted to the decision of the court or to the jury under the instructions of the court."

But all the evidence that could have been offered in the case at bar "to show the meaning and effect" of the language used in the certificate was actually offered in the court below and ruled upon.

All these statutes were before the court below, as they are before us, and no evidence except those statutes exists that could illumine the question. The court below has already done what the Supreme Court said should have been done in Hardyman's case, and we think the decision on the point was correct.

Second. The second exception shows that the detective, in narrating the occurrence in the post-office when he confronted the traverser, described his trepidation and the dropping of his hand from the pocket where the stolen

money was found, and had stated that it was in a pocket-book in his pocket, and in a general way he described the pocket-book. Then the exception proceeds:

"And upon cross-examination of said witness by defendant's counsel he was asked if he was as certain of the accuracy of his statements regarding the falling of defendant's arm and his actions when he perceived that he was observed by witness, as he was of the accuracy of his description of the pocket-book; but the United States objected to said question, and the justice presiding sustained said objection, and refused to permit said question to be put."

It does not appear from the exception how far the cross-examination had progressed; whether it had been already long and tedious, and how fully all important matters had already been gone over; nor does it appear that the defendant's counsel was prepared to show that the description of the pocket-book was not correct. We are, therefore, bound to assume that the judge had good reasons for refusing to allow the question to be put. But on general principles, where a question is asked on cross-examination, not directly bearing upon anything that had come out in chief, the effect of which would be to raise a side issue as to an unimportant matter (in this case as to the particular form of the pocket-book) it would be proper for the judge to arrest such a course of examination at once, as a useless consumption of time, tending to no good purpose, and withdrawing the attention of the jury from the issue really before it. The authorities are uniform, that in such a case it is the duty of the court, in the exercise of its discretion to determine how far such cross-examination should be allowed. It is enough to refer to the case of *Rea vs. Missouri*, in 17 Wall., 532, on this point.

Third. The third exception is this:

"And thereafter, after the testimony on both sides had closed, the court, upon its own motion, proceeded to charge the jury, and said to them in substance and effect that if

they believed from the evidence that the defendant was an employee of the Post-office Department, that the letter described in the first count of the indictment came into the hands of the defendant in the regular course of his duties as such employee, or was accessible to him, and that the defendant took from said letter the money described in the indictment and offered in proof, or any part thereof, they should convict him of the charge contained in said count. To the portion of which charge in which the court said that *if the letter was accessible to the defendant*, the said defendant, by his counsel, then and there excepted, and prays the court now for then, to sign and seal this his third bill of exceptions."

Taking this language literally there is no point in the exception; for there can be no reason why the judge should not have uttered the eight words objected to. Some other words must be supplied by the court here before the exception becomes intelligible. And if we are to correct the ellipsis to make some sense of it, there is less reason why we should construe it in the way insisted on by defendant's counsel, than in the way the District Attorney contends it should be understood.

The defendant's counsel says the judge in effect told the jury that they could convict if they believed from the evidence that the letter described in the first count of the indictment came into the hands of the defendant in the regular course of his duties as such employee of the Post-office Department, or was accessible to him not in an official way. While the District Attorney says the judge told the jury that they might convict, if they found, among other things, that the letter described in the first count of the indictment came into the hands of the defendant or was accessible to him in the regular course of his duties as such employee. We think this reformation of the sentence is more consistent with the general tenor of the court's rulings, and with the other words in the paragraph; and surely we are rather

to presume the judge spoke sense than the reverse. In the case of *Coleman vs. Heurich*, 2 Mackey, 203, a verbal inconsistency was pointed out between what the judge had said in one particular portion of his charge and what he had said more than once in other portions, and there the court declined to reverse because of this apparently inconsistent language, and addressed itself to reconciling the statements.

Each of these exceptions appear to have been signed in April, but in the following June Judge Montgomery signed a paper which is treated here as his charge; and at the end of the record it is said "the foregoing bill is signed by consent of counsel, they having agreed to the same." In that charge the judge used this language:

"You will readily see that the establishment of the offense charged in this count involves the necessity of proving:

"First. That the defendant was in the postal service.

"Second. That the letter in question in that count never reached young O'Neal.

"Third. That it was deposited in the post-office and came to the defendant's hands through the mails.

"Fourth. That it came to him *or became accessible to him because of his position or place in the post-office*—language utterly inconsistent with the construction contended for by the defendant's counsel."

But it is very doubtful whether it was necessary to have averred that the letter came into the traverser's possession in the regular course of his official duty; because the law punishes "whoever shall steal, &c., out of any letter which shall have come into his possession either in the course of his official duties *or in any other manner whatsoever*."

The case seems to have been tried with care. If we are to credit the testimony set forth in the exceptions, the defendant could scarcely more fully have been proved guilty if he had admitted the charge in open court; and we are satisfied we are doing no injustice when we overrule all these exceptions.

We do not rule upon the further question presented by the District Attorney as to whether Section 803 of the Revised Statutes of the District of Columbia, which enacts that it shall not be necessary, where exceptions are taken from rulings in the trial of a cause, that the judge shall sign and seal the exception, applies to criminal cases.

The judgment below is affirmed.

GEORGE MASON

vs.

HARVEY SPALDING.

1. Where the language of a written contract leaves it in doubt as to what is its subject-matter, parol evidence may be received to show the circumstances surrounding the parties at the time of contracting, for the purpose not of changing or altering its meaning but of throwing light upon the language used and ascertaining the true meaning of the contract.
2. Where a decree is partly in favor of complainant and partly in favor of defendant, and the complainant appeals from so much of it as is against him, and the appellate court finds no error in that portion of the decree, it must be affirmed *in toto*; there can be no correction of that which is against the defendant, he not having appealed.

In Equity. No. 10,830. Decided January 21, 1889.
The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL by complainant from a decree in equity construing a contract, on a bill filed for an account.

THE CASE is sufficiently stated in the opinion.

Messrs. COLE & COLE for complainant:

Parol testimony may be introduced to explain, but not to subvert a written contract; to define its subject-matter where there is uncertainty about it, but not to prove it to be different from what is plainly expressed. It is admissible to explain what is doubtful but not to contradict what is plain. 1 Greenl. Ev., Secs. 275 *et seq.*; Smith on Contracts, (5th ed.,) 47 *et seq.*, also 61; Brawley vs. United States, 96 U. S., 168.

The expectation of one party or the anticipation of the other, cannot affect the construction of a contract, but effect must be given to it according to the law as construed and established by the courts. Maryland vs. Rwy. Co., 22 Wall., 111; 1 Story Eq. Jur., Secs. 111 *et seq.*; Bank vs. Daniel, 12 Peters, 56.

Mr. S. T. PHILLIPS for defendant:

Evidence as to *subject-matter* (as contra-distinguished from evidence of *negotiations* preceding a contract) is competent. 1 Greenl., Sec. 286; Bradley *vs.* Steam-packet Co., 13 Peters, 89; Canal Co. *vs.* Hill, 15 Wall., 94; Reed *vs.* Insurance Co., 95 U. S., 23; Peck's Case, 102 U. S., 64; Mobile & Co. *vs.* Jurey, 111 U. S., 584.

Mason agreed orally in January, 1881, for a valuable consideration, to modify the contract of June, 1880, and to contribute to the subsequent expenses of the business.

Such oral modification was competent. Teal *vs.* Bilby, 123 U. S., 572; Canal Co. *vs.* Ray, 101 U. S., 502; 1 Pom. Eq., Secs. 70, 379, 383; 1 Green, Sec. 303.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

The bill seeks relief in relation to a written contract between the parties. So much of that contract as seems important to be considered now reads as follows:

"Harvey Spalding, having for several years been engaged in the prosecution of claims of postmasters and late postmasters for adjustment of their salaries in conformity to Section 8 of the Act of June 12, 1886, and having a large number of such claims now in hand, to wit, seventeen hundred or thereabouts, and being now engaged in the prosecution of said claims, and in securing for prosecution other similar claims, of which he expects to secure in the aggregate, including those in hand, about four thousand in number, more or less, upon agreed fees equal to 25 per cent. of the amount which shall be collected in each case; and having secured the passage by the Senate of Senate Bill 903, this Congress, and the favorable support of House Bill No. 3981 by the proper committee of the House of Representatives, which bills propose a basis for the settlement of the claims herein referred to, and the substance of which he expects to be enacted into law, and being in need of funds to conduct his said business to completion, hereby

agrees to sell the said George Mason one-fourth of all his interest in said claims now in hand and all that he may hereafter secure, and one-fourth of all his fees therein, free from all charges for expense of prosecuting said claims to collection thereof, for the sum of twenty-five hundred dollars.

"The said interest and share in said claims and fees shall vest in said Mason on payment by him of said purchase-money, and a *pro rata* proportion of said interest and share shall vest in said Mason on payment of each installment of said purchase-money, as hereinafter provided. The said Mason shall pay the said purchase-money to the said Spalding as follows:

"He shall pay the sum of \$100 on signing this contract, and a further sum of \$100 on or before the 12th of June instant. He shall pay a further sum of \$300 on or before the 5th day of July proximo, and a further sum of \$750 on or before the 5th day of October next. He shall pay a further sum of \$600 on or before the 5th day of November next, and a final payment of \$650 on or before the 5th day of December next.

"It is further agreed that a due proportion of all the powers of attorney and contracts for fees to cover the interest of said Mason shall be transferred to him by said Spalding by proper indorsements of substitution of the powers of attorneys and assignments indorsed upon the contracts, and said fees may be collected by the said Mason, and an account thereof shall be kept, and all the fees collected by the said Spalding shall be accounted for and settlements shall be made from time to time as collections are made, and a division thereof shall be made, three-fourths going to said Spalding and one-fourth to said Mason. The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can, and to make contracts for fees equal to 25 per cent. of the collections, and to subject the whole to be shared, together with those in hand, by said George Mason for the consideration hereinbefore specified.

"And the said George Mason agrees and binds himself to pay over to the said Harvey Spalding the whole amount of said sum of \$2,500, within the time and in the installments as hereinbefore specified, unless he shall elect to pay the whole of said sum within a shorter period than the time named."

So much of the answer as is material for us to consider in reference to the questions presented is as follows :

"It is also true that about June 1, 1880, this defendant, being in great need of money for expenses in connection with that business, made application therefor to the complainant. As ground of that application this defendant explained to the complainant his whole business, situation, and prospects in the above relation. Amongst other things he referred to the probability that one or other of two bills then pending in Congress and bearing upon that business would be enacted, to wit, that Senate Bill 903 had already passed the Senate, while House Bill 3981 had received a favorable report from the appropriate committee. At the same time the difference in provision by those bills was discussed, and that Senate Bill 903, which made provision for fewer postmasters than House Bill 3981 did, was, at the same time, from its situation on the calendar, more likely to be enacted. And this defendant then stated to the complainant that in the course of the nine years for which he had been engaged in that business he had prepared lists of the names of some 7,500 postmasters who, he was satisfied, would, in part or all, be included in the provisions of such bills, and also that of these about 1,700 had already duly authorized him to prosecute such claims as their attorney, with a stipulated compensation equal to 25 per cent. of what should be recovered, whilst he had good ground to believe that in the end he would be so authorized by some 4,000 of these.

"In the course of the same application it was said and understood between the parties that the classes of postmasters

included in the bills and previous legislation would be paid the difference between the amounts of any salary which, during a particular period, they might already have received and the amount of such commissions as, but for legislation in 1864 and after, they would substantially during the same period have received; and it was also then distinctly stated to the complainant by this defendant that it was upon the understanding and theory that the latter had made up the lists aforesaid, as well as had taken the powers of attorney and formed expectations as to the number of clients whom, in the end, he might procure as above stated.

"And this defendant then told the complainant that under the narrower relief of Senate bill 903, which seemed also, as above stated, the more likely of the two to become a law, he estimated that the whole amount of claims that probably he might collect would be worth about \$75,000 and his own fees, consequently, about \$18,750, whereas, if House Bill 3981 were enacted those amounts would be, respectively, about \$400,000 and \$100,000. * * *

"Further answering, this defendant saith that in administering the Act of March 3, 1883, the Postmaster-General, in May, 1883, announced a construction thereof and of the Act of 1866, referred to therein, which contradicted the construction assumed as above by the parties thereto as a basis of the contract of 1880, and by this defendant in making up the list of 7,500 cases aforesaid. By this construction of the Postmaster-General the 10 per cent. increase mentioned in said statute did not mean such increase within any one quarter of the year, and therefore did not authorize an addition to compensation either in such quarter or in the quarter succeeding that, but meant such increase through a biennial term of quarters, and that it authorized such additional compensation in any case only for the succeeding biennial term. In February, 1884, this construction was concurred in by the Attorney-General. One effect thereof

has been to defeat much the larger part of the 1,700 claims and claimants aforesaid and also much the larger part of the 4,208. Another effect has been to substitute for this class of defeated claims and claimants a much larger number of others entirely different in title and in person, being such, indeed, as theretofore, so far as this defendant is informed, had not been thought of."

The contention between the parties as to this part of the case arises upon the construction to be given to the contract. To what claims did this contract relate? It is claimed by the plaintiff that the contract related to all claims that might be prosecuted by the defendant Spalding arising under the Act of 1866 and any subsequent legislation of Congress, whether under Senate Bill 903 or House Bill 3981, mentioned in the contract, or some other bill that might thereafter be introduced in Congress. It is claimed that the language is comprehensive enough and specific enough to embrace all such claims.

On the part of the defendant it is claimed that the contract had relation to a particular class of claims then within the minds of the parties; that they are partly described in the contract and referred to by the language used in the contract. And it is claimed on the part of the defendant that he should be permitted to show the circumstances surrounding the parties relating to the subject-matter at the time of making the contract.

It is claimed by complainant that this would be to alter or change the plain meaning of the contract.

The subject-matter of the contract is 1,700 claims in hand and other similar claims, expected to be sufficient in all to make about 40,000, his interest being in said claims now on hand and all that he might thereafter secure. He agreed to obtain all the claims of the class named that he could and subject the whole to be shared with the said George Mason.

It is clear from this language that the parties were con-

tracting with reference to some class of claims understood between themselves. He agrees to sell an interest in all the claims in hand and all similar claims, and then he agrees to obtain all the claims he can of the class named. What claims are *similar* to those in hand, and of what *class* of claims is it that he agrees to procure all that he can?

We think this is a case where it is proper to introduce the circumstances surrounding the parties at the time of contracting, for the purpose not of changing the meaning of the contract or altering it but for the purpose of throwing light upon the language used and ascertaining the true meaning of the contract. This case is similar in principle to a few cases that have been cited to us and to which we will refer.

"In *United States vs. Peck*, 102 U. S., 64, it is said: "Parol evidence of the surrounding circumstances is admissible to show the subject-matter of a contract."

That is the syllabus. The statement of the case is as follows:

"Peck, the claimant, entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the military station at Tongue River in the Yellowstone region, on or before a specified day. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officers of the Government claimed the right to deduct from the claimant's wood account the increased cost of the hay. Whether this could lawfully be done was the principal question in the cause.

"The court, upon an examination of the contract and of the surrounding circumstances of the case, were of opinion that the contracting parties, in stipulating relating to hay, contemplated hay to be cut in the Yellowstone Valley, and specially at the Big Meadows, near the mouth of Tongue River—which was, indeed, the only hay which the claimant could have procured within hundreds of miles, and which

it was known he relied on. The Government officers, fearing that the claimant would not be able to carry out his contract, and it being absolutely necessary that the hay should be had, allowed other parties to cut the hay at Big Meadows and therewith to supply the Tongue River station. The claimant complained of the double injury: first, of giving the hay which he relied on to other parties; and, secondly, of charging him for the increased expense of getting it."

Mr. Justice Bradley; in delivering the opinion of the court, says:

"We think the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: first, for the purpose of showing by the surrounding circumstances the subject-matter of the contract, namely, hay to be cut and gathered in the region where it was to be delivered."

He further says:

"That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances. *Bradley vs. Washington, Alexandria and Georgetown Steam Packet Co.*, 13 Peters, 89; *Thorington vs. Smith*, 8 Wall., 1; *Maryland vs. Railroad Co.*, 22 Wall., 105; *Reed vs. Insurance Co.*, 95 U. S., 23; 1 Greenl. Ev., Sec. 277; *Taylor's Ev.*, Sec. 1082."

It will be noticed that the written contract in this case does not include anything as to the description of what was to be furnished or the place from which it was to be furnished. The court, however, permitted parol evidence to be introduced for the purpose of showing that the parties at the time of making the contract contemplated hay to be cut at the mouth of Tongue River at Big Meadows, to supply the Tongue River station near the mouth of Tongue River; that this was the only hay that could be furnished at any reasonable expense by the claimant in order to fulfill his contract.

In *Reed vs. The Insurance Co.*, 95 U. S., 23, the syllabus reads thus:

"A policy of insurance on a vessel at and from Honolulu via Baker's Island to a port of discharge in the United States, contained a clause: 'The risk to be suspended while vessel is at Baker's Island loading.' *Held*, in view of the circumstances which must be supposed to have appeared to the parties at the time of making the contract, that the meaning of the clause is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not.

"Although a written agreement cannot be varied by proof of circumstances out of which it grew and which surrounded its adoption, they may be resorted to for the purpose of ascertaining its subject-matter and the stand-point of the parties in relation thereto."

In this case the vessel insured was lost while in port at Baker's Island for the purpose of loading, though not actually engaged in loading at the time of its loss.

Mr. Justice Bradley in this case says:

"This case upon the merits depends solely upon the construction to be given to the clause in the policy before referred to, namely, 'the risk to be suspended while vessel is at Baker's Island loading,' and turns upon the point whether the clause means while the vessel is at Baker's Island for *the purpose of loading*, or while it is at said island *actually loading*. If it means the former, the company is not liable; if the latter, it is liable.

"A strictly literal construction would favor the latter meaning; but a rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are

constantly resorted to for the purpose of ascertaining the subject-matter and the stand-point of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities."

"On this subject Professor Greenleaf says:

"The writing, it is true, may be read by the surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it or substituted in its stead. The duty of the courts in such cases is to ascertain not what the parties may have secretly intended as contra-distinguished from what their words express, but what is the meaning of the words they have used?' 1 Greenl. Ev., Sec. 277."

Again: "The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and, availing ourselves of the light of the surrounding circumstances in this case, as they appeared or must be supposed to have appeared to the parties at the time of the making of the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause, in absolute literality, the risk would be only suspended when loading was actually going on. It would revive at any time after the loading was commenced if it had to be discontinued by stress of weather or any other cause. It would even revive

at night when the men were not at work. This could not have been the intent of the parties. It could not have been what meant by the words 'while vessel is at Baker's Island loading.'"

Looking to the surrounding circumstances of this case, we find that the parties discussed a class of claims entirely different from the class of claims which were finally prosecuted by the defendant and the amounts recovered for which he received these fees. He had on hand then, for which he had powers of attorney, some 1,700 claims. He had a list of 7,500 claims under the Act of 1866, which he presumed to be collectible under that act and under subsequent legislation then contemplated. He states to the complainant by written statement, which the evidence substantially shows he did give the complainant at the time of this negotiation, that he supposed there would be from 8,000 to 10,000 claims altogether under the Act of 1866, and of that number he hoped to get, or expected to get, 4,000 himself, having already acquired 1,700. It is stated in this paper that these claims are all claims in excess of \$25.

It appears by the answer, too, that upon the construction which he gave to this Act of 1866 at the time the contract was made, which both parties admit was discussed between them, the act related to compensation due to postmasters prior to the passage of the Act of 1866, and would be recoverable for single quarters where the compensation would be more than the amount which was actually paid to the postmasters. Under a subsequent statute, passed in 1883, by the construction of the Postmaster-General of the act of 1866, as modified by this act of 1883, it was held that the law did not apply to single quarters, but to a series of biennial quarters, and did not apply to compensations which might have been earned by postmasters under the Act of 1854, in accordance with the section of the Act of 1854 as specified in the Act of 1866, to compensations already earned, but applied to compensations that might result for the benefit of postmasters after the passage of the Act of 1866.

The effect of this was, as is agreed, and as is stated in the pleadings of both parties, to change the class of claims very materially. Many of the persons included in the list of 1,700 which the defendant had at the time of making this contract were excluded by this construction of the Postmaster-General, as well as of the list of 4,000 which he expected to get, as also of the list of 7,500 which he had upon his books at the time of making this contract.

That being the case, the question arises whether or not it is competent for the defendant in this case to introduce evidence showing the condition of the very subject-matter about which the contract was made, for the purpose of showing to what the parties referred when they spoke of certain claims already obtained, and certain similar claims which they expected would be obtained by the defendant for the prosecution. Was it a general indefinite undertaking on the part of the defendant to procure and prosecute all the claims that he could under the Act of 1866 and any subsequent legislation that might be enacted by Congress? Was it to give to this plaintiff, for the specified sum of \$2,500, one-fourth of all that he might obtain thereafter in relation to such claims? Or was it in relation to some definite class of claims which the parties understood at the time and had in mind at the time they made their contract?

We think that the reasonable view favors the latter supposition: That the parties contracted with reference to what they knew or what they supposed they knew—as to claims that they believed had an existence at the time they made their contract rather than to some indefinite or unknown class of claims not then in the minds of the contesting parties. We think, therefore, that the parol evidence introduced by the defendant for the purpose of showing the surrounding circumstances, which was admitted by the court below and to which the plaintiff objected, was properly received and should be considered in construing this contract, not for the purpose of changing its meaning, but to give the true meaning to the language employed by the

parties to the contract, and that the ruling of the court below, permitting this evidence to be introduced, and in applying it to the contract, and in holding that this contract related to the claims then in hand and then listed and referred to and understood to be in existence by the parties at the time of making the contract was right and should be confirmed.

There is some controversy whether the defendant at the time did not exaggerate the number of claims. There is not much question made about that, but the defendant stated the value of the claims to be \$2,000,000. It turns out that, under the construction given to the law by the Postmaster-General, the value of these claims was less than seems to have been estimated loosely by the defendant, and the payment of which was made subject of consideration by the plaintiff at the time of the negotiation, and that the gross amount of the fees was somewhat less; but this is not an action for fraudulent representations. It is an action to recover what the plaintiff claims is due to him upon the contract, and the purpose now is to ascertain the real contract obligation. There may be some controversy between the parties as to the surrounding circumstances, but the material facts that the parties discussed the claims on hand and the quantity of claims that would probably be procured and the sort of claims that would be prosecuted under the Act of 1866, with the added legislation then expected by the passage of either the Senate or House bill mentioned in the contract are proved beyond question.

Did the parties contract with reference to something they talked about as existing, or was it an indefinite or general contract to compel the defendant to prosecute all claims that might arise under the Act of 1866 and any subsequent legislation of Congress with any construction that might be given to that legislation by the Executive Department? We think not. We think that it is immaterial; that there may be some variance between these two

parties, who testify as to some of the circumstances occurring at the time of the negotiations between them. It is agreed, however, that these things were discussed, and the parties do agree, not only in their testimony, but in their pleading, that the construction given to this legislation by the Postmaster-General in 1883, and the Attorney-General in 1884, was never contemplated or considered or thought of by either of the parties until about the time that construction was made; and they do agree, both in their testimony and in their pleadings, that this construction made a very material change. By that construction many of the claims which they had anticipated were wiped out, and a much greater number of claims, less in value, were substituted and of a different character and for a different cause and for a different time, and embracing to a very considerable extent different persons from those embraced in the claims which were under contemplation by the parties at the time of making their contract.

There is another question in the case. It appears that some time after the making of this contract and after the defeat of the Senate bill and the adjournment of Congress without passing the House bill mentioned in the contract the defendant became disheartened, according to the averment of the plaintiff himself in his plea, and was proposing to give up all further efforts in relation to the matter, but was encouraged by the plaintiff to persevere upon a promise on his part to pay one-half of all the expenses after that time in regard to such prosecution, the original agreement being that he was to pay \$2,500 and not to be chargeable with any expenses beyond that sum. The defendant says that, in consideration of this promise on his part, he agreed to continue his efforts to procure the needed legislation. Perhaps it should be mentioned that, by reason of time having elapsed as to the postmasters in office at the time of the passage of this Act of 1866, at the time these salaries were earned by postmasters the law was no longer in con-

dition to be executed without further legislation. Therefore it became necessary that there should be a further act of Congress; and in 1882 this defendant agreed, as he says in his answer, in consideration that the plaintiff pay half of the expense, to continue his efforts to get the needed legislation.

The court below found against the defendant on this part of his answer. He alleges that the expenses were very heavy, amounting to something like \$60,000; that the complainant was liable to pay one-half of these expenses. But the court below found against the position of the defendant in this particular; but found for the defendant as to the construction in regard to the class of claims embraced in the contract.

From this decree of the court below the complainant appealed. The defendant did not appeal from the decree against him in reference to the costs of the prosecution of these claims. No cross-bill was filed.

While this matter has been the subject of considerable argument between counsel orally and in their briefs, it is conceded by counsel for the defendant, the appellee, that if the court affirms the decree of the court below as to findings upon the question of what is embraced within the contract of the parties, as to that part of it which is against the complainant and from which he appeals—if they affirm that, then the court must affirm the decree *in toto*, inasmuch as the defendant has not appealed from that part of the decree which is against himself. He only claims that part of the decree might be modified and reversed upon the appeal of the defendant.

Inasmuch, then, as we affirm the decree of the court below, from which the complainant appeals, the decree will be necessarily affirmed *in toto*. We cannot recognize the right of the defendant to have this matter reviewed when it was not appealed. There is nothing for us to decide.

The decree of the court below will be affirmed.

FLORENCE T. MITCHELL

vs.

CHARLES P. THOMSON.

1. Where in a will a trust is created and no person is named to perform the trust, the executor will be charged with its performance, if upon the whole will such appears to have been the intention of the testator.
2. Where a testator makes his debtor executor of his will and directs the money due from him to be invested in land for the use of another, the executor will be charged with the duty of making the investment if no other person is named.
3. Where a debtor is appointed executor of his deceased creditor the debt at once becomes cash assets in his hands; if the debt is not yet due it becomes assets as soon as it matures.

In Equity. No. 11,106. Decided January 29, 1889.
The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree sustaining a demurrer to a bill in equity.

THE FACTS are stated in the opinion.

Messrs. H. O. CLAUGHTON and FRANKLIN H. MACKEY for complainants:

The defense set up in this case cannot commend itself to a court of conscience. The defendant does not deny receiving the money, nor the making of the note, nor the bequest of it by the testatrix, nor his subsequent acknowledgment of the legacy and trust, nor his receiving commissions thereon, nor his admission that the note was a debt due the estate by paying a part of it after he qualified as executor; he is seeking merely to avoid his liability by a technicality.

If this bequest was a trust, and was accepted by the defendant, he could be discharged of it only in two ways, either by a release from the beneficiary or by a decree of a court of equity. There is no claim that he has ever been released by a decree. This leaves the defendant but one

ground of defense, and that is that the acceptance of the unindorsed note by the guardian of the defendant was a release of the trust by the guardian, and that the acceptance of the note from the guardian was a ratification of the release made by the guardian; and, further, that the action at law upon the note was an independent release.

First. The transaction between the executor and the guardian, which was merely handing over the unindorsed note, was utterly void, or just as void as if it had been a blank piece of paper. Of course this void act was not capable of ratification.

There was really no note, or debt evidenced by a note, in existence after the defendant qualified as executor of the testatrix. From the moment of such qualification that note was paid by Charles P. Thomson, and there was in the hands of the executor the sum of \$2,000 for a distribution under the will. 2 Williams on Exrs., 1311, and authorities cited.

"Where the will declares a trust, and no trustee is named, the executor *who proves* the will thereby accepts the trust."

"Where a trust is created by a will, and no trustee appointed, the executor is bound to act as such trustee." *McBurney vs. Carson*, 99 U. S., 572; *Pettingill vs. Pettingill*, 60 Me., 412; *Richardson vs. Knight*, 69 Me., 385; *Holbrook vs. Harrington*, 16 Gray, 102.

Second. The declaration of separate estate for a minor female is good. She cannot dispose of it until she is of age. If she marries before she is of age, the quality of the estate inheres. If she become of age before she marries, although she may dispose of it, yet if she afterwards marries, the quality of separate estate at once attaches, not because of the marriage, but because of the original creation. *Tyler on Infancy and Coverture*, Sec. 304; 2 *Story Eq. Jurisp.*, Sec. 1384, and cases cited.

Mr. A. S. WORTHINGTON for defendant:

Even assuming the trust to be definite enough to be capa-

ble of enforcement by a court, it does not appear that the defendant has accepted it.

He is not appointed trustee by the will. The duty of investing the money does not devolve upon him either as husband or as executor. It may be conceded that in many cases the acceptance by an executor of that office carries with it the acceptance by him of duties which are devolved by the will upon the executor which do not strictly pertain to the office. But those are not cases like this. The distinction between the cases in which the person who is both executor and trustee under the will becomes trustee by accepting the office of executor, and those in which he does not, is well pointed out in *Perry on Trusts*, Vol. I, Sec. 262. The doctrine there laid down and supported by the authorities cited by the author is that the acceptance of the executorship is an acceptance of the trust only when the executor *as such* is to act as trustee. This subject is considered also in the previous case in this court of *Hamilton vs. Clark*, 3 Mackey, 428, where it was held that an executor was not authorized to make a sale which was provided for in the will, but which the will did not provide should be done "by my executor." Mr. Justice JAMES dissented in that case, but placed his dissent upon the ground that in that case, after the sale provided for had been made, the proceeds were to be distributed in accordance with certain directions contained in the will; and, as was said by Mr. Justice JAMES in his dissenting opinion, "the American courts * * * look at the whole will, and, if they find that there is to be a sale and a distribution of the money proceeds, they hold that to be an act of administration, and that the person who is to make a distribution is to take the step necessary to do it." This does not apply to the present case, and there is no reason for construing this will to mean that the executor, as executor, is to make an investment for the benefit of the daughter of the testator.

Under the will the complainant had the right to elect whether

she would take the \$2,000 in money (or, what is the same thing, take the note itself) or take the land. She has exercised the right by taking the note, and cannot now claim the land.

If the executor (or trustee appointed by the court) had invested the \$2,000 in real estate, and had had the same conveyed to the daughter of testatrix, she could at once have sold the property, and could have done with the proceeds what she pleased. Where that is the case, it is optional with a legatee to take the funds, or to take the property in which it is to be invested. In other words, where money is to be converted into real estate, or real estate is to be converted into money, for the benefit of a legatee, the latter has his choice of demanding and receiving either the property in its original state or that into which it is directed to be converted. 1 Jarman on Wills, 397, 598; 2 Redfield on Wills, 419; 2 Story's Eq. Jurisp., 793; Craig vs. Leslie, 3 Wheat., 578; Mandelbaum vs. McDonnell, 29 Mich., 86; Barlow vs. Grant, 1 Vernon, 255; Nevill vs. Nevill, 2 Vernon, 431; *In re Brown's Will*, 27 Beavans, 324; Stokes vs. Cheek, 28 Beavans, 620.

As was said in Craig vs. Leslie, "this election he (the legatee) may make as well by acts or declarations clearly indicating a determination to that effect as by application to a court of equity." In the present case the complainant, through her guardian, elected to take the money. The receiving of the note was a clear indication of the wish of the legatee that she should receive the fund itself, instead of the real estate into which it was to be converted. This action of the guardian the complainant ratified (if that was necessary) when she became of age by taking the note from him. And thereafter, if there was any obligation upon the defendant in this case, it was as maker of the note and not as executor or trustee under the will.

This would be so, even if it appeared that the complainant stills holds the note; but much stronger is the case when she not only does not offer to bring the note into

court to be canceled, but does not even aver that she still has it in her possession. For all that appears to the court it may have long ago been transferred to somebody else. Indeed, it may have been paid, for there is no allegation to the contrary in this bill. It may be said that the note was not indorsed by the defendant as executor when he delivered it to the complainant's guardian. But that fact is not averred. It was averred in the original bill, but that position has been deliberately abandoned in the present bill; and if it were averred it would make no difference, for the delivery of the note unindorsed would pass the title thereto (*Wood vs. Wermer*, 104 U. S., 786), and the guardian would have had the right, had the note been valid, to bring a suit in equity either to compel the defendant to indorse the note as executor or to compel him to pay the money outright. Indeed, this is just what was done by the complainant herself in the original bill in this case. Complainant's counsel, having ascertained in that proceeding that there is a good defense to a suit brought upon the note, now seeks to wipe out all that has been done by the guardian and by the complainant in respect of this note, and to proceed as though it had remained in the hands of Thomson.

Mr. Justice JAMES delivered the opinion of the Court:

The case of *Florence T. Mitchell vs. Charles P. Thomson* is presented upon demurrer to an amended bill. The complainant states that she is the daughter of Emma D. Thomson, by her first husband, Quincy Thomas, who died in the State of Texas, in the latter part of the year 1853, intestate, leaving complainant *en ventre sa mere*, as his only surviving child; that shortly after the death of her father her mother removed, with complainant, from the State of Texas to the city of Philadelphia, and there, on or about the 23d day of February, 1888, married the defendant; that some time after this marriage her mother loaned to the defendant, her second husband, out of her separate estate, the sum of \$2,000, and that, as a memorandum thereof, the

defendant made and delivered to her mother a paper in the nature of a promissory note, the said paper being in words and figures as follows:

SEPTEMBER 1, 1881.

Three years after date I promise to pay to the order of Emma B. Thomson two thousand dollars at interest of three per cent. per annum. Value received.

C. P. THOMSON.

On this paper there were two indorsements in the handwriting of the defendant. "December 7, 1881 [which was during the life-time of the wife] by cash on account of interest, \$15." "April 3d, 1883, by cash on account of interest, \$17." The date of the last indorsement being after the wife's death, which took place on the 20th day of December, 1881, in the District of Columbia. The wife had this note in her possession at the time of her death. The bill further states that complainant's mother, by her last will, devised to complainant all of the property of which she died possessed or to which she was entitled; but directing, among other things, that the said \$2,000 should be invested for the benefit of complainant and her heirs, in real estate, free from the control of her husband; and then nominated the defendant as executor; that the defendant, on the 2d day of June, 1883, petitioned this court, then holding a Special Term for Orphan's Court business, to admit the said last will to probate, and to issue letters testamentary to him as executor thereof; all of which was duly granted; that the defendant thereupon duly qualified as such executor, proceeded to the administration of the estate of his testatrix and entered upon the trust. Complainant further avers that although the said \$2,000 is imperatively directed to be invested in real estate, as the sole and separate estate of the plaintiff, and although the defendant accepted this trust and has never in any way been discharged therefrom, yet he has wholly failed to perform the duties devolved upon him by the trust by investing the \$2,000 as directed by

testatrix. The prayer of the bill is that the executor be compelled to make the investment.

The principal defense presented on the demurrer is that the defendant's liability, if there be any, is not that of a trustee, but is merely a personal liability for payment of the \$2,000 of money personal, and that action is barred by the Statute of Limitations. It is clear that, if this be only a personal liability, then, as the bill was filed more than four years after the note became due, the statute would bar complainant's demand; but if, on the other hand, defendant was charged with an express trust, that trust can still be enforced. Looking to the will we find that it merely directs that this \$2,000 due by the husband shall be invested in real estate for the benefit of complainant. It does not, in express terms, direct that *he* shall be the trustee for that purpose, nor does it say who shall make the investment. The question is whether the will is to be construed, notwithstanding, as making the executor trustee for that purpose. We think that according to the American cases it should be so construed. In order to ascertain whether an executor is made a trustee to carry out a particular direction of the will the whole instrument is to be considered, and he may be charged as with an express trust if, by proper construction, the will imports that the trust is to be executed by him. It is not necessary that he should be designated *nominatim*, it is enough that he should be designated by construction; that is to say, by the intent of the will. In this case it appears that a certain fund in the hands of the executor is a purchase-money fund, directed to be paid in the purchase of real estate. We think that the implication is immediate that this fund is to be applied to the purchase by the person who has it—in other words, that the executor is appointed trustee to purchase, and that he necessarily accepted that trust when he accepted the executorship.

It is conceded that the complainant could elect to take the money instead of the land, and that by so doing she would waive the execution of the trust. But, on the other hand, she had a right to insist upon its execution. That matter vested exclusively with the beneficiary of the trust. Accordingly, counsel for the defendant claims that it appears by the proceedings in the Orphan's Court, which are referred to in the bill and made part thereof, that the plaintiff has accepted the note given by the defendant for the said \$2,000, and has thereby elected to accept the money, and has relieved the defendant of the trust. But the only papers referred to and made part of the bill are those belonging to the defendant's account as executor, and no such fact is shown by these. It was asserted in argument that when complainant's guardian settled his account, after she obtained majority, he turned over to her this note, which he had received from the defendant as her legacy, and that complainant accepted this note from him in settlement. It is clear that the guardian could not make the election. We are not prepared to say that complainant's acceptance of that note from him was an act of which the defendant can avail himself as an acceptance from him, and a waiver of the trust, especially as he had not indorsed the note so as to give complainant legal title to it. But we are not called upon to decide that question, inasmuch as the guardian's account and settlement, by which alone this acceptance by complainant is alleged to appear, are not referred to and made part of the bill.

We have spoken of the defendant's debt as assets in his hands, capable of application to the trust. Our attention was called to the fact that the note was not due when the defendant accepted the executorship. But the rule which treats an executor's indebtedness as assets is not confined to debts due at that time. If the debt matures at any time before his duties of administration cease, it then becomes assets. *Griffin vs. Bauman*, 9 Rich. S. C., 71. This note did

mature before this bill was filed and before his duties had been really performed. We hold, then, that the defendant stands as having now in his hands the fund which should be applied in purchase of real estate. Accordingly we overrule the demurrer.

The decree of the Special Term is reversed, and the cause is remanded, with leave to answer.

WILLIAM JOHN MILLER

vs.

LIZZIE DEAN FLEMING ET AL.

1. A limitation in a deed, mediately or immediately, to the right heirs of the grantor, is void, for a man cannot convey to his heirs by deed.
2. Nor does it make any difference that the conveyance is to trustees to the use of another for life and afterwards to the use of his heirs; the last use will be a resulting use to himself in fee, and he will have as perfect a legal reversion as if he had made a common-law conveyance for life only.
3. Nor does it make any difference that in addition to limiting the estate to the use of his heirs the grantor adds a direction to convey to them.
4. Nor that he directs the conveyance to be made to them "as tenants in common and not as joint tenants."
5. In a marriage settlement the estate was conveyed to a trustee to the use of the wife for life with remainders over to the use of the issue of the marriage, and failing such issue to the use of the right heirs of the settlor, their heirs and assigns, and the trustee was directed to convey to them "as tenants in common and not as joint tenants." After the marriage the husband died leaving a will, which after devising other property not included in the deed of settlement, gave the rest and residue of his estate to his grandson. The wife then died, and there being no issue of the marriage it was *Held*, That the limitation to the right heirs was void and the estate passed to the grandson under the residuary clause of the will.

In Equity. No. 10,422. Decided January, 1880.

The CHIEF JUSTICE and Justices HAGNER, COX, JAMES and MONTGOMERY sitting.

This was a bill of interpleader filed by a trustee to settle the rights of claimants of the estate. The case was once argued and decided (6 Mackey, 397), but because of the importance of the principles involved a rehearing was granted before a full bench.

STATEMENT OF THE CASE.

On the 21st day of December, 1861, Edward Owen, of the District of Columbia, being about to contract a second marriage, executed a deed of settlement, premising therein that the same was made for the purpose of settling "upon

and for the said party of the second part (his intended wife) and the children and issue of the said intended marriage;" and also "for making for, and towards the jointure of the said party of the second part," in case she should survive him; and also "for making some provisions for the sustenance and support of the children and issue of the said intended marriage."

He then conveys the property in question to William John Miller upon trust as follows:

1. To the use of the settlor, his heirs and assigns until the intended marriage.

2. Then to the use of the intended wife for and during the term of her natural life free from the debts, control, &c., of the settlor, her intended husband, and the rents to apply to her sole use and benefit, and for the sustenance and support of any children of said marriage.

3. Should she die after the marriage before the settlor, then to the use of the settlor, his heirs and assigns.

4. Should she, after the marriage, survive the settlor, her intended husband, and then die, leaving children of the marriage, then to the use of the said children and the children by the settlor's former wife living at the death of said intended wife.

5. Should she survive the settlor and then die, without leaving children of said marriage, then "to the use of the right heirs" of the settlor, "their heirs and assigns as tenants in common, and not as joint tenants;" and the trustee is directed to convey, within six months thereafter, the described property "to the right heirs of him the said party of the first part, their heirs and assigns in fee simple as tenants in common, and not as joint tenants."

After the execution of this deed of settlement the marriage took place, but no issue resulted therefrom. In course of time the husband died, leaving his wife surviving and six persons who are admitted to be the *right heirs* of the settlor. Previous to his death, however, he made his last will and

testament, whereby he devised "all his real and personal property, &c., to his grandson, Mills Dean, in words following:

"Having disposed of the greater part of my estate by deed to Mills Dean upon certain trusts, and being desirous of disposing of the remainder of my estate, * * * I will, devise and bequeath to my grandson, Mills Dean, and his heirs and assigns, all my estate, real and personal, wherever situate." * * *

The wife survived her husband a number of years, and then dying, the question arose (there being no issue of the marriage), to whom did the property go?

The heirs of the settlor, of whom there were six, claimed it under the ultimate limitation in the deed to "the right heirs."

On the other hand, the grandson, Mills Dean, claimed it under the will as sole devisee, he insisting that the ultimate limitation to right heirs left the reversion in the settlor and passed by his will, and this was the question before the court.

The trustee thereupon filed this bill of interpleader to settle the rights of parties.

Messrs. MORRIS & HAMILTON for the heirs.

Mr. FRANKLIN H. MACKEY for the devisee.*

Mr. Justice Cox, after stating the case substantially as above, delivered the opinion of the Court:

The object of the deed of settlement is declared in the recital to be "in the prospect and in consideration of said intended marriage, and for making such provision and settlement upon and for said party of the second part, and the children and issue of said marriage as hereinafter mentioned," and it thereupon proceeds to provide, first, for the intended wife for life, and then, that if she should not survive the grantor but die without issue, the trustee should

* The argument of counsel appears in the former report of the case of *Miller vs. Fleming*, 6 Mackey, 397.

hold for the use of the grantor, his heirs and assigns forever; but if she should survive him and die leaving issue, the trustee should hold to the use and benefit of the children of the intended marriage, and the children of his first marriage.

If the intended wife should die without issue, after surviving him, then the whole object of the settlement would fail, and it is natural to suppose that the grantor would direct the property, in that contingency, to be held for his heirs at law, as if no such settlement had been made. Accordingly, it is provided that, in such case, it should be held for the use, benefit and behoof of his right heirs, their heirs and assigns. But the grantor, or his draughtsman, evidently supposed that the title to the heirs, in such case, would pass by the deed, and since, according to existing law at that time, a conveyance to several, without more, would give a joint tenancy, with survivorship, he adopted the usual formula employed in such cases to prevent the survivorship, viz., the qualifying words, "as tenants in common and not as joint tenants." If the question had been asked the grantor, whether he meant to create a tenancy in common, as distinct from a co-parcenary, he would probably have replied that he designed to avoid a joint tenancy, and to give equally among his heirs, according to the law of descent, and that he had no idea of giving his estate any direction other than that which the law gave it. And if it should appear that the legal effect of the deed of settlement was no other than that, his purpose would not be frustrated.

Let us then consider the legal effect of the deed. If one seized in fee grants a life estate to another, without more, he has left in him a reversion in fee. If he grants the life estate with remainder to himself and his heirs, he still has the reversion, and the limitation to himself, by way of remainder, is void. The result is the same if he limits the remainder directly to his heirs, instead of to himself and his heirs. The limitation to his heirs is simply void, be-

cause he cannot convey to his heirs by deed, either immediately or by way of remainder after another estate granted for life to some one else. Nor can it make any difference that he conveys to trustees to the use of another for life, and after to the use of his heirs. It will be considered a resulting use to himself in fee, and he will have as perfect a legal reversion as if he had made a common law conveyance for life only. Thus, *Fearne on Remainders*, page 50, says:

“But a limitation to the right heirs of the grantor will continue in himself as the reversion in fee. As, where a fine was levied to the use of the conusor for life, remainder to the use of B in tail, remainder to the use of the right heirs of the conusor, it was adjudged that the limitation to the right heirs of the conusor was void, for that the old use of the fee continued in him as a reversion. So where A enfeoffed J. S. and J. N. in fee, to the use of himself for forty years, and afterwards to the use of his second son in tail male, remainder to the use of the right heirs of A forever, it was resolved that the use limited to the right heirs of A was the old use; that it was void as a remainder, and was merely the reversion in A.

“And where A seized in fee conveyed the lands to the use of J. and M., his wife, and of the heirs male of the body of J., and afterwards to the use of the right heirs of said A, upon a question whether the remainder limited to the use of the right heirs of A in the lands in which he had no particular estate, was in him as his reversion or vested in his heir by purchase, it was the clear resolution of the whole court that this use so limited to A's right heirs was the old use, and continued in A as the reversion. See, also, 1 *Preston on Estates*, 455.

The same rule is stated in American cases. Thus, in *Loring vs. Eliot*, 16 Gray, 568, a bill was filed by the trustee under a marriage settlement of real and personal property, to obtain the instruction of the court on the following facts: By a deed of settlement property was conveyed in trust for

the settlor and her heirs, until her marriage, then to her use for life, then to transfer the property to her children, if any, and if none, then *to transfer the same in like manner unto her heirs at law*. She died without leaving children, but meanwhile had devised her estate to strangers, and on the question whether *they* were entitled or the *heirs at law*, claiming as purchasers under the settlement (precisely the question here), the Court said the settlor had the reversion in her, in case of her death without issue, which she could lawfully dispose of by will.

In *King vs. Dunham*, 31 Ga., 743, a woman, in contemplation of marriage, conveyed to trustees for the use of herself and her intended husband for their lives and that of the survivor, then for the issue of the marriage, if any, and if none, then in trust for their heirs. And afterwards, there being no issue, the settlement was so modified as to give the property absolutely to the husband, on the death of the wife without issue. After the wife's death, her heirs claimed that they had a vested remainder by the original settlement, which could not be affected by the subsequent alteration, but the court held otherwise. So in *Harris vs. McLaren*, 30 Miss., 539, one John Thurman conveyed certain negro slaves to the use of his daughter for her life, and after her death to her children, if any, and they failing, "to return to my lawful heirs." The court said, "it is a settled maxim of the common law that a man cannot make a conveyance of real property to his heirs. Hence, it is uniformly held, that an ultimate remainder limited to the right heirs of the grantor is void, and although the fee be expressly limited away from him, it will continue in him as his old reversion and not as a remainder. The heirs will take by descent and not by purchase." And this rule was applied to the devise of the negroes.

Nor can it make any difference that, in addition to limiting the estate to the use of his heirs, the grantor adds a direction *to convey to them*. The limitation to the use of

the heirs, if it had any operation, would, by virtue of the statute of uses, immediately pass a legal estate. The further direction would be simply superfluous. In fact, if there were no limitation to use, but instead of that a direction to convey, that of itself would be equivalent to the former, and the estate would pass without a conveyance. That was substantially held by this court in the case of *Haw vs. Brown*, 1 Mac Arthur, chiefly on the authority of *Poor vs. Considine*, 6 Wall., 458. In *Haw vs. Brown*, it appeared that a testator devised his estate to a trustee upon active trusts, viz., to manage and dispose of the same for the husbanding and increase thereof while her grandsons were under age, and to apply the income, in his discretion, for their maintenance and education during minority, and, as they, respectively, came of age, to turn over and account to each one for one-half of the estate.

One of them became of age and entered into possession of his part of the estate and afterwards died without having received a deed from the trustee for the real estate, and the question was, whether the legal title was in him so as to entitle his widow to dower.

Here, there was no dry or passive trust, with a limitation to the use of the grandson, but the whole trust was an active one, including the final act of turning over the property, which would mean, as to the real estate, a conveyance. But the court held that when the active duties of the executor and trustee for the benefit of the minor were at an end, the legal seizin passed to the beneficiary, and no conveyance was necessary for that purpose.

In *Poor vs. Considine*, the Supreme Court said: "Where a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary it will exist, though no words of limitation be found in the instrument by which the title passed to the trustees, and the estate created on the other hand, it is equally well settled that where no intention

to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation, and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct." The same was substantially held in *Loring vs. Eliot*, 16 Gray, 568. See, also, the case of *Tillinghast et al. vs. Coggeshall*, 7 R. I., 383.

From these authorities, it is apparent that if this deed of settlement had not provided at all for the case of the wife's death without issue, the legal reversion after her life would have remained in the grantor, in fee simple. And if the limitation, after her death without issue, had been simply to his right heirs, without any qualification, the legal reversion would equally have been in him. And the additional direction to the trustees to convey to his right heirs would neither have added to nor taken from the effect of the limitation to their use. It would not have created an additional trust, the execution of which was necessary to the passage of the legal title to the heirs. It would have been simply surplusage. And so, in like manner, when the use is to the right heirs, as tenants in common and not as joint tenants, the direction to convey accordingly adds nothing to the effect of the limitation to use, which, if it can operate at all, can do so without this addition. So that the remaining question is, simply, whether, where the grantor, after creating a particular estate or estates, limits the property to the use of his right heirs, which would ordinarily not create an estate in them by purchase, but would leave the reversion in himself, the effect is changed by adding the words "as tenants in common and not as joint tenants."

The affirmative is maintained only on the ground that such a rule obtains in the case of a devise, which is supposed to be an analogous case. A devise by one to his heirs simply, is said to be void and the heirs are said to take by descent. But if the deviser gives a different estate from that which would descend, as where he devises to his

heirs an estate for life only, with remainder over, it is said to be an effective devise, passing an estate by purchase.

And the same rule is held to apply in a case where one devised to his heirs *as tenants in common*, on the the ground that if there are several who could take, *i. e.*, female heirs, they would not take by descent *as tenants in common*, but *as co-parceners*, and therefore, the devise would give a different estate from that which would pass by descent. Now, the question is, whether the rule laid down in *Ferne*, as before stated, is to be modified in the same way, *i. e.*, if a man limits his estate by deed, by way of remainder, to his right heirs, which would be simply void and leave the remainder in himself, to go to the heirs by descent, would the addition of the words in question change the rule and give the estate to them directly by purchase?

It would be sufficient to say that, as far as appears, no such case is to be found in the books.

In the next place, the two cases are entirely different. A man's will goes into effect after his death, when there are heirs, and when the estate goes immediately to them, either by descent or purchase.

The deed, on the other hand, operates in his life-time, and from its date, if it all, when there are no heirs. In the case of a remainder, either to the grantor and his heirs or to his right heirs, the reversion is in him and only goes to his heirs through him. Now, if the addition of the words "*as tenants in common*" has any effect, one of two things must follow, *viz.*, either that the grantor, by a deed may declare that the estate shall descend through him, to his heirs, in a different manner from that prescribed by law, which is absurd; or else, that, by the use of these qualifying words, the operation of the law, which would otherwise place the reversion in the grantor, is arrested, and he deprives himself during his life-time of all control over his inheritance.

There is no authority for either view, as far as we are

advised. And there seems to be very good reason for maintaining that a different rule should obtain in this case from that of a devise immediately to heirs.

The fixed interpretation of a remainder to the grantor's heirs is, that it gives the grantee himself the same estate which the law would give him, and, therefore, his title is referred to the operation of the law. Instead of holding this estate modified by the use of the words referred to, it would seem more reasonable to hold them to be entirely inoperative, as inconsistent with the nature of that estate. And an argument from analogy in support of this view is supplied by a series of decisions now to be referred to.

It is well known that, according to the rule in *Shelly's Case*, if an estate be limited to one for life, with remainder to the heirs of his body, the grantee takes an estate tail; his children take by descent from him and not by purchase from the grantor. In the cases mentioned, the limitation to the heirs of the body has been qualified by these same words, "as tenants in common and not as joint tenants." Thus, in *Doe, d., Candler vs. Smith*, 7 D. & E., 352, the limitation was to one for life, with remainder to the heirs of her body, as tenants in common and not as joint tenants. In *Pierson vs. Vickers*, 5 East, 548, it was to the heirs of the body, whether sons or daughters, as tenants in common and not as joint tenants. In *Jessop vs. Wright*, 2 Bligh, 1, a leading case, it was to the heirs of the body lawfully issuing, share and share alike, as tenants in common, and so on, in a number of similar cases cited in 2 Jarman on Wills, 277, 209. Instead of allowing these words to qualify the estate given by the principal terms of the devise, the qualification was rejected as repugnant to the nature of the estate devised and the estates held to be descendible to the heirs of the body generally.

The parallel may be stated thus: Where an estate is devised by way of remainder to the heirs of the body of a tenant for life taking under the same instrument, the law

decrees the estate to be in the life-tenant and to go to his children by descent, notwithstanding the limitation to them as tenants in common.

So, where the grantor of a life estate gives a remainder to his own heirs, the law decrees it to mean a remainder to *himself and his heirs* and will declare the fee to be in the grantor, though as a reversion, notwithstanding the limitation to the heirs as tenants in common.

In both cases, the apparent intent of the limitation is to pass an estate by purchase to heirs. In both cases it is overruled by the law.

The result of these considerations is, that the deed of settlement left the fee simple in Mr. Owen and capable of being devised by him.

It is not denied that if this was the case, it was passed by his subsequent will as a part of the residue of his estate.

As this is decisive of the present case, it is unnecessary to discuss the question whether, if these words "as tenants in common and not as joint tenant," were allowed full effect, as in a will, they would really give a different estate from that which heirs would take under our act of descents, so as to justify the application of the old rule which treated them, in such case, as purchasers.

This was the question discussed in the former opinion delivered in this cause. The majority of the court are satisfied with the conclusions then announced. But inasmuch as there is a division of opinion in the court on this subject, we prefer to base our final decision of the case on the grounds that have just been declared.

CHARLES E. FRASER

vs.

THE DISTRICT OF COLUMBIA ET AL.

1. It is not necessary that the matter appealed from should be a final order, if it be one involving the merits of the action or proceeding.
2. An order refusing to tax an attorney's fee does not involve the merits of the action or proceeding, and is not, therefore, appealable.
3. Where *certiorari* proceedings have been dismissed by the petitioner, costs to the defendant are not allowable.

At Law. No. 27,914. Decided February 18, 1899.

The CHIEF JUSTICE and Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from an order overruling a motion to tax an attorney's fee.

THE FACTS are stated in the opinion.

Mr. A. G. RIDDLE for the motion.

Messrs. BIRNEY & BIRNEY *contra*.

Mr. Justice HAGNER delivered the opinion of the Court:

Some time since a large number of petitions were filed in the Circuit Court for writs of *certiorari* to bring up to that court the proceedings of the District Commissioners in reference to sundry assessments and taxes. They were ordered to be heard here in the first instance. One of the petitions was selected as a test case, and after argument, this court overruled the motion of the petitioner to quash the assessment, holding that the proceedings were correct; and remanded the petitioner to the Circuit Court. Whereupon the petitions in the other cases, including Fraser's, then pending in the Circuit Court, were dismissed by counsel, who settled the costs, not allowing an appearance fee for the defendant's attorney. Afterwards a motion was made in the Circuit Court by the attorney who had appeared for the

District of Columbia for a retaxing of the costs so as to include an appearance fee of five dollars in each case, on the ground that the *certiorari* petitions were to be considered as *suits* that had been discontinued; and under Sec. 824, R. S. U. S., such a fee was taxable "in cases at law, when the case is discontinued." The judge holding the Circuit Court overruled the motion, and thereupon an appeal was prayed by the attorney of the District, and the case was brought to the General Term. Early in the session, on the motion of Fraser's attorney, the appeal was dismissed. The present motion is to re-instate the appeal upon the ground that it was improvidently dismissed; and also to review the decision of the court below, which refused to allow the taxation of the attorney's fee as part of the costs.

As to the first question: While Sec. 772 of our Revised Statutes is more liberal in some respects as to the right of appeal than the general statute of the United States, inasmuch it is not necessary that the matter appealed from should be "a final order," still it is required that the question to be appealable should be one "involving the merits of the action or proceeding."

Now, it is very plain to us that an order simply refusing to tax an attorney's fee cannot be construed as involving "the merits of the action or proceeding," in the slightest degree.

The petition for *certiorari* is an application for a special remedial writ and cannot be classed with ordinary suits at law. It is an application to a court to direct an inferior jurisdiction to send up a pending controversy to be heard in the court ordering the writ. Since the petition to send up a pending suit to be heard cannot itself be considered as a suit, surely it cannot involve "the merits of the action or proceeding" at all that the defendant's attorney has or has not had its appearance fee taxed. The District of Columbia, one of the defendants, cannot be concerned in the question whether the attorney received the five-dollar fee;

and still less is the Treasurer of the United States concerned in the matter.

In 3 Peters, 319, *Canter vs. The American Insurance Company and Ocean Insurance Company*, of New York, Justice Story, in delivering the opinion of the Court, after noting several objections that had been taken to the proceedings in the decree in admiralty, said, "It may be added that no appeal lies from a mere decree respecting costs and expenses."

We decline to comply with the request to reverse our previous order dismissing the appeal.

Second. We were solicited to examine the other question presented as to the correctness of the ruling below refusing to tax these attorney's fees as part of the costs. The matter was thoroughly examined and an interesting argument presented, and we will say a word on the subject, as it is said to be a matter of consequence in practice.

It must be conceded, of course, that costs are the creation of statutes. As they did not exist at common law, there must be some statutory enactment or provision to justify their imposition. There is no statute here, providing that on a party dismissing his *certiorari* proceedings, the other party shall recover his costs.

As far back as 1797, in the case of *Duvall vs. The State of Maryland*, 4 H. & McH., 4 (which was an application for a *certiorari* to review in the General Court the proceedings in a landlord and tenant case), after the case had been dismissed, a point was made whether there should be a taxation of costs in favor of the defendant. It was insisted by the petitioner's counsel that there could be no such allowance of costs to the defendant, where a petition for a *certiorari* had been dismissed. In the brief of counsel there is a reference to 1 Bacon's Abridgment, 517, which is exactly to the point, based upon a statute expressly giving costs in *certiorari* cases generally; but it was decided that the general language of the statute did not comprehend the case

where the petition had been dismissed. The point was not decided by the court, but afterwards, in 1816, a statute allowing such costs was passed in Maryland to comprehend that class of cases; of course that statute has no application here, but its passage seems to be an admission of its necessity, to enable the courts to make such an allowance.

We find the decisions on this point in a number of the States perfectly uniform. See 12 Wendell, 262; 25 Barbour, 444; 8 Johnson, *Low vs. Rogers*, 321, and a number of cases in Massachusetts, and 3 N. H.: *State vs. Weare Leavitt, Jr.* In the latter case a writ of *certiorari* issued at the instance of the petitioner to a justice of the peace to bring up the proceedings had before said justice upon the complaint of a member of a militia company against Leavitt, for neglect of duty in not mustering with the company. The court on hearing ordered the proceedings to be quashed; whereupon counsel for the respondent moved the court to allow costs to the defendant. The court refused the motion, and said "no costs are ever allowed in cases of this kind, whether the proceedings be quashed or affirmed." 3 Mass., 268; 4 *Id.*, 565; 11 *Id.*, 465.

It is not necessary for the decision of the present question to go as far as this. All we decide here is that where *certiorari* proceedings have been dismissed by the petitioner costs to the defendant will not be allowed.

The motion, therefore, is overruled.

HORACE S. WALBRIDGE

vs.

SIDNEY R. HAMMACK.

1. Where in an action of ejectment the acts and conversations of the testator are given in evidence for the purpose of ascertaining the meaning of an uncertain description of lands devised, the verdict of the jury will not be disturbed unless it be clearly against the weight of the evidence.
2. While a grantor is estopped to deny that his deed actually conveyed what it purports on its face to convey, he is not estopped to deny that it did purport on its face to convey the interest alleged by the grantee.
3. Although a mortgage be a legal title, it is not the fee simple absolute of the land, and language in a deed which might be sufficient to convey the latter, will nevertheless be construed as purporting to convey only the former if that intention is shown by recitals or by anything within the four corners of the deed.

At Law. No. 26,207. Decided March 6, 1889.

THE CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

MOTION for a new trial on a bill of exceptions taken in an action of ejectment.

THE FACTS are stated in the opinion.

Messrs. SHELLABARGER & WILSON and E. A. NEWMAN for plaintiffs :

Settlement by parol agreement or long acquiescence in a boundary line will be encouraged by the courts. Wakefield vs. Ross, 5 Mass. Rep., 16 ; Mac Arthur vs. Henry, 35 Tex., 801 ; Kincaid vs. Dormey, 47 Mo., 337 ; Cullom vs. Smith, 56 Pa. St., 86 ; Orr vs. Hadley, 36 N. H., 575 ; Jordan vs. Deaton, 23 Ark., 774.

Where the deed recites that grantor is seized he is estopped to deny his seizure and the estoppel binds the estate. Van Renselaer vs. Kearney, 11 How., 325 ; Landers vs. Brent, 10 How., 374 ; Bigelow Estop., 344-347.

Ejectment can only be sustained on a strict legal title. Smith & Butt vs. McCann, 24 How., 398 ; Langdon vs. Sher-

wood, 124 U. S., 83; Hickey's Lessee vs. Stewart, 3 How., 759; Prentiss vs. Stearns, 113 U. S., 445.

Where the deed's description is certain no parol evidence can be received in ejectment to vary it. Parker vs. Kane, 21 How., 1; Maxwell Land Grant Case, 121 U. S., 325; Iron Co. vs. Iron Co., 107 Mass., 316, 317; Tucker vs. Madden, 44 Me., 206; Hileman vs. Wright, 9 Ind., 126; Davidson vs. Greer, 3 Sneed, 384; Ruffner vs. McConnell, 17 Ill., 212.

"If there be a repugnancy between the granting part of the deed and the *habendum* as to the estate which the grantee is to take in the land, and the contradiction cannot be reconciled, the *habendum* must yield to the granting part." Farquarson vs. Eichleberger, 15 Md., 63; Budd vs. Brook, 3 Gill (Md.), 236; Tyler vs. Moore, 42 Penniston, 374-384.

Messrs. WM. F. MATTINGLY, REGINALD FENDALL and CHAPIN BROWN for defendants:

The naked legal title is not alone sufficient for recovery in ejectment. The action of ejectment is a possessory action and the plaintiff in order to recover must not only have the legal title but the right to the possession of the property. Tyler on Eject., 77; Lannay vs. Wilson, 30 Md., 536; Smith vs. McCann, 24 How., 404; Cincinnati vs. White, 6 Peters, 431; Dickinson vs. Colgrove, 100 U. S., 578; Kirk vs. Hamilton, 102 U. S., 68.

A particular description cannot be enlarged by reference to a prior deed. Brunswick Sav. vs. Crossman, 76 Me., 583; Sherwood vs. Whiting, 64 Conn., 330; Parker vs. Kane, 22 How., 448; Prentice vs. Stearns, 113 U. S., 448; Falls Village Co. vs. Tibbets, 31 Conn., 167.

Latent ambiguities in a deed are explainable by parol, and the evidence should be submitted to a jury; it is not a question of law for the court. Putnam vs. Boyd, 100 Mass., 58; Warner vs. Miltenberger, 21 Md., 264; Reed vs. The Proprietors, 8 How., 287; Atkinson vs. Cummins, 9 How., 479.

A mortgage in law is regarded merely as a security for the debt. Payment of the debt ends it.

An outstanding satisfied mortgage will not defeat an ejectment. An outstanding unsatisfied mortgage providing on its face for retention of possession by the mortgagor will not defeat an ejectment. The mortgagor is always regarded as the true owner. *Coal and Iron Co. vs. Detmold*, 1 Md., 225.

Mr. Justice JAMES delivered the opinion of the Court:

This is an action of ejectment for the recovery of a parcel of land alleged to contain $6\frac{1}{2}$ acres more or less, part of an estate formerly owned by General Hiram Walbridge, deceased, and known as "Ingleside." After issue joined a stipulation of counsel was filed, to the effect that both plaintiff and defendant claimed the premises under the title acquired by the said Walbridge; and that his last will and testament, dated December 5, 1870, and recorded in the office of the register of wills in this District, should be admitted in evidence without proof. Afterwards Heman D. Walbridge and Reginald Fendall, surviving trustees under the last will and testament of Helen B. Corkhill, deceased, were admitted as parties to defend instead of the defendant, Hammack, who was served as tenant.

Verdict was for the defendants. Motion for a new trial was overruled, and the case now comes here on a case stated and bills of exception.

The main issue turns on the meaning of certain descriptions in the will above referred to of the properties devised, respectively, to the wife and to the brother of the testator. The will was in the following words:

"In the name of God, amen, I, Hiram Walbridge, of sound mind—disposing body, do ordain and constitute this my last will and testament, as follows: First, to pay my just and lawful debts; second, to give to my wife my estate known as Ingleside, consisting of Ingleside and all of the personal property thereon, consisting of sixty-five acres, near the city of Washington, for her as her personal property forever, her heirs and assigns, and the further sum of one hun-

dred and ten thousand dollars, to be paid to her as follows: Five thousand dollars thirty days from the day of my decease, fifty thousand dollars one year from the day of my death; five thousand dollars—eighteen months of my decease, and the remaining fifty thousand dollars two years from the day of my death; to be paid to her by my executors. Second, my farm near the city of Washington, consisting of one hundred acres, shall be given and bequeathed forever to my brother, Heman D. Walbridge, as his sole and exclusive—forever to him, for his use and property forever. Thirdly, my remaining property to my brothers, Heman D. Walbridge and Horace S. Walbridge, to their sole use and property forever; charging them with carrying out the first propositions of this will and testament. To this will and testament I hereby subscribe. I charge Horace S. Walbridge and Heman D. Walbridge as my executors to this instrument, in the presence of Amos Dodge, of New York, Charles B. Blake, and Doctor James Phillips, of the same place; Amos Dodge, Doctor James Phillips, and Charles B. Blake, subscribing witnesses to the same.

“Dated in New York, December 5, 1870.

“HIRAM WALBRIDGE.”

The first question to be considered is, whether the land in dispute was devised by this will to Mrs. Walbridge as part of “Ingleside,” or to the plaintiff as part of the “farm;” in other words, in what sense the testator used these designations. His acts and conversations were admitted for the purpose of determining that question. The plaintiff, for example, produced an earlier will and a deed of trust, in both of which provision had been made by the testator for his wife, as tending to show what dividing line between Ingleside and the farm must have been in his mind when he made his last will. In order to make an intelligent use of these documents we must first, however, consider certain conveyances to which they refer, and which were also

produced by the plaintiff. For the same reason a preliminary statement should here be made.

The property near Washington, mentioned in the will, was purchased by the testator in several parcels. Two of these originally constituted the Hewlings estate, though they were at the same time divided by a certain county road. This Hewlings property, while thus divided, had been known as "Ingleside." These facts sufficiently explain the deeds to which we shall refer.

By a deed dated May 12, 1855, Edward Hewlings, Thomas B. A. Hewlings, and Mary L., his wife, conveyed of these parcels to Samuel T. G. Morsell, describing it as "being a *part* of a certain tract of land called 'Ingleside,' and being all of the said tract which lies *south* of a certain county road," &c. By a deed of the same date Morsell and wife conveyed the same parcel to the testator, describing it in the same words. Two days later, by a deed dated May 14, 1855, Thomas B. A. Hewlings, as trustee for his wife, Mary L., who joined by way of request, conveyed to the testator a parcel lying on the *north* side of the same road, describing it as "being a *part* of a certain tract called 'Ingleside,' * * * and being the portion of said tract upon which has been erected the Mansion House on said tract," &c. Finally the testator purchased from William Stone and others a third parcel adjoining to and north of the Hewlings property, by a deed dated April 26, 1861, which described the premises as "being those parts of the tracts called 'Pleasant Plains' and 'Slippery Hills,' contained within the following bounds," &c.

It was to these sources of his title that the testator referred in the following provisions of his proposed will of August 22, 1864:

"2d. In lieu of the right of dower I hereby give to my esteemed and beloved wife, as a tribute for her devotion and affection to me—I give and bequeath the mansion 'Ingleside,' and the *sixty acres* of land which surrounds it north

of the road which leads to Mr. Pierce's farm, *the land here intended being that purchased by me of Mr. T. B. A. Hewlings and the additional twenty (20) acres purchased of the court through Mr. Stone, the lawyer*; all the personal property in the mansion and all the horses, carriages, &c., belonging to me and in use there are also to go with the real estate above described. I further give and bequeath to my said wife the sum of ten thousand dollars, to be paid by my executors at the rate of two thousand dollars per annum, without interest, commencing on the 1st of January succeeding my death and payable in five installments of two thousand dollars each. I further give to my said wife the indebtedness due me of two thousand dollars and its interest due me from advances made her son-in-law, Alfred H. Jackson, and request the notes given me by said Jackson to be given to her, and also the furniture, to the value of some two hundred dollars, which I have advanced for her son Chas. B. Blake. I further give her one thousand dollars, to be given her within thirty days after my decease.

"3d. To my esteemed and good mother I give my farm south of the road leading to Mr. Pierce's, *this farm being the land purchased by me of Mr. Sam'l T. G. Morsell, and consists of nearly one hundred acres.*"

The first question is whether the deeds referred to in this paper had of themselves the effect to define the meaning of Ingleside and farm. The plaintiff's printed argument asserts their independent effect in the following language: "Thus it is seen that the deeds themselves both appeal to the old county road; that of the 14th of May calling for said old road, *as forming the south boundary of the Ingleside tract*, and the one of May 12 calling for the old road, *as the north boundary of the farm*. At this time, therefore, the 'mansion tract' was completely distinguished from 'the farm' by the deeds themselves, and 'the farm' was given its separate individuality, name and boundary, as distinguished from the mansion or 'Ingleside' tract, named as

such in the devise to Jane M. Walbridge, and each was bounded on the old road."

This statement assumes that those instruments contained expressions which are not found there. Neither of them mentions or indicates the existence of a "farm;" and "Ingleside" is not applied in either as the special name of either tract. On the contrary, both tracts are described as being equally *parts of Ingleside*; the county road between them being further described as a road which divided the tract known as "Ingleside." Nor is the Mansion House mentioned in the deed of May 14 in a way that imports that the tract north of the county road was its peculiar appurtenance, or was therefore to be understood to be especially Ingleside. The language of the deed is, that the parcel north of the road was "that portion of said tract," namely, that portion of Ingleside, "upon which had been erected *the Mansion House on said tract*;" that is to say, the Mansion House on whatever was Ingleside. This deed distinctly imports that the house erected on one of the parcels had been the Mansion House of the whole estate, and that each parcel had originally borne the same relation to it. Nothing in this paper indicates that the original name of both parcels had become restricted to one of them, when they were thus reunited in the hands of one owner, by what seems to have been one transaction, looking to the establishment of a single estate under one name.

It is in the proposed will of 1864, then, that we first find any parcel designated by a distinguishing name. The testator there devised to his mother his "farm," referring for more particular description to Morsell's deed; and it is only in this way that these deeds have anything to do with the sense in which the testator used *this* designation in his last will. By this reference it is ascertained that the word "farm," as used in the proposed will of 1864, described the whole of the parcel lying south of the old county road, and, therefore, included the land in dispute. But its effect in

explaining names stops just there. It does not follow that General Walbridge, when speaking of part of his land as his "farm," did not regard it as part of Ingleside, or that he applied that name distinctly to the rest of his land. In that particular paper he did not use "Ingleside" as the designation of land at all, and it is only from subsequent facts that we can learn how he applied it then or came afterwards to apply it. In view of the fact that the testator acquired both parcels as parts of "Ingleside," we do not perceive any ground for holding that he used that name in a new sense or with a new application until he used it as a descriptive name. We have to await his own application of it. With this in view, we proceed to examine the rest of the documentary evidence. The plaintiff produced next a paper which was executed by the testator on January 8, 1867, but was not delivered.

It purported to convey to his brother, in trust for the grantor's wife during her life the following-described lands: "All that *part or portion of a certain tract of land called 'Ingleside,'* and bounded on the northward by the Piney Branch, on the eastward by the land of William Selden, and on the south and southwest by a county road which divides the said tract, and being that portion of said tract upon which has been erected the Mansion House on said tract, it being the same property which was conveyed or intended to be conveyed by Thomas B. A. Hewlings to said Hiram Walbridge by deed bearing date on the 14th day of May, 1855," &c., "also all that part of Pleasant Plains and Slippery Hills contained within the bounds, &c., following," &c. These were precisely the same lands which the testator had proposed, by the will of 1864, to devise to his wife in fee.

It was urged at the argument that this latter paper had the effect to show that the testator gave the name of "Ingleside" to the lands north of the old county road, notwithstanding this construction would apply it to the Stone tract, to which it had never been applied before. We have

already said that that paper could not be so construed. It now appears further by the proposed trust of 1867 that the testator could not yet have assigned a new meaning to that name. After the lapse of nearly two and a half years, he still described one portion of the land north of the county road as part of Pleasant Plains and Slippery Hills, and the other as *part* of a tract called Ingleside. This does not show the adoption of Ingleside as the special name of the whole north tract. Indeed this paper makes no figure in explaining the sense in which the testator was in the habit of using that name.

But just here it is worth while to observe what effect it did have. It simply shows what provision General Walbridge intended in 1867 to make for his wife, and that fact is immaterial. It is important, however, to keep this very point in mind, inasmuch as the argument for plaintiff has seemed to us to rely to some extent on prior intention. It appears to assume, not in direct terms but in effect, that the testator's intention, as to the extent of the provision for his wife, was the same in his last will as in the will of 1864, and then to claim that the boundary named in the earlier paper shows, by re-action, the boundary of the same land described as Ingleside in the last will. Of course that conclusion is of no value without proof that the testator did speak of the same land, and that his intention was actually the same in both wills. As no reference is made in the last to the prior will, the papers themselves show nothing on that point.

It may be said of all the papers prior to the last will that their effect to show the sense in which the testator finally used the designation in question is a matter of interpretation for the court, and we do not find in this part of the evidence any application of the name "Ingleside" as the distinguishing name of any parcel of testator's estate. Nevertheless, these documents were to be considered with the whole evidence by the jury, and we have to determine

whether their verdict was against the weight of the evidence thus taken together. We proceed to that question.

It appears that as early as the year 1860 measures were taken by the Levy Court for the establishment of a new county road south of the road which divided Ingleside when the testator purchased that estate, and contemplating the abandonment of the old one. It is between this new county road and the old road that the land in dispute lies; and the substantial question is, whether the testator had come, when he made his last will, to regard the parcel thus cut off by the new road as peculiarly appurtenant to the Mansion House, and as finally constituting the estate to be known as Ingleside.

The defendant first produced the following deed executed by the testator on April 5, 1860, and recorded September 6, 1860 :

“This indenture, made this fifth day of April, in the year of our Lord (1860) eighteen hundred and sixty, between Hiram Walbridge and Jenny M., his wife, both of the city and county of New York of the first part, and the United States of the second part, witnesseth :

“That the Levy Court for the county of Washington, District of Columbia, are about to remove a section of a road leading through the old race field by Shoemaker’s mill for the purpose of getting a better grade ; and, whereas, to effect the said change, the said party of the first part have agreed to convey the land occupied by the changed road to the United States for a public county road, the said Levy Court agreeing upon their part to make the said road and keep the same in repair and to forever relinquish any and all claims to the said party of the first part of all and every portion of the said road before it is changed, according to and in compliance with sundry resolutions passed at sundry times, which, by inspection of the books and proceedings of the said court will fully appear and explain. Therefore, witnesseth : That the said party of the first part, in consideration of one gold dollar to them in hand paid by the

Levy Court in behalf of the United States, the receipt of which is hereby acknowledged, have granted, bargained, sold, enfeoffed, and conveyed and confirmed to the United States for a county road, *upon the conditions above expressed*, the land held and contained in the following metes and bounds, to wit," &c.

One of the conditions referred to in this release was that the old county road should be relinquished, and it thus appears, by his own instrument, that it was the intention of the testator at that time that the old county road should be obliterated, at least as a public dividing line. As to the effect of the change upon the private condition and arrangement of the testator's property, Mr. George H. Plant who was then a member of the Levy Court, testified that the testator had said to him that he wanted to get the main road away from in front of his premises; that he expected to live there himself some time, and knew that the travel in front of his house would annoy him, and that he wanted to extend his front lawn. The same witness also testified that the testator, in a dozen conversations with him, always called the property down to the new road "Ingleside."

Mr. S. P. Brown, also a member of the Levy Court from 1861 to 1869 or 1871, testified that General Walbridge consulted with him about the improvement of his property, and had said "that he was annoyed very much by teams going by there, and wanted to increase this property surrounding his house, so as to give him more room and get rid of this annoyance. He further stated that the testator, in repeated conversations with him, called the land down to the new road "Ingleside," and the land south of that road the "farm." The same witness testified, on cross-examination, that the testator graded the disputed strip after the new road was made, and consulted him about making a circular road around his mansion and down to the new road.

S. W. Saxton testified that he had lived near the Walbridge property since 1869, which was in the life-time of the

testator ; that the old county road was then overgrown with grass ; that a hedge which ran along the north side of the new road was the inclosure of the grounds around the mansion occupied by the Walbridge family ; that, so far as appeared from an inspection of the property, the southern boundary of the property occupied by the Walbridge family, and included within the inclosure in which the Mansion House stood, was the new road ; and, on cross-examination, the same witness stated that the land down to the new road, although not a distinct lawn, "all seemed to be lawn to this hedge along the new road." He added that "on the upper part of it there may have been a little that was rough and had been cultivated."

Albert Gleason testified that he rented the land south of the new road on March 1, 1864, and occupied it between two and three years ; that General Walbridge used to come over to the farm ; that he spoke of the property north of the new road as "Ingleside," and of that south as the farm he rented to witness.

Simeon Nelson testified that his father rented and occupied a place called the Walbridge farm just prior to 1870 ; that the boundary of the farm was the county road ; that there was only one road, and witness knew of no old county road. By further description the witness pointed out the new county road as the boundary.

Albert L. Sturtevant testified that he lived at Mt. Pleasant, and worked at "Ingleside" in 1866 and 1867 ; that the grounds north of the new road were inclosed and occupied by the Walbridge family in connection with the Mansion House.

Now, if the jury believed the testimony which we have recited, its tendency is plain. It tends to show that, although the whole of the tract south of the old county road, together with that portion of the Hewlings property which lay north of that road must, through his deeds of purchase, have been known to the testator as "Ingleside," while the twenty acres

bought of Stone was known to him in the same way as part of "Pleasant Plains" and "Slippery Hills," he came to apply that name in a way of his own. There is, we understand, no dispute as to his applying it to the Stone tract as well as to *some* part of the original Hewlings tract; to what part of the latter is the only disputed question. The point here is, that he did not apply Ingleside as it had been applied in his title deeds, but in a way of his own; and, in the next place, that he had come to distinguish between what he called Ingleside and what he called his farm. Several witnesses testified that, in distinguishing between Ingleside and the farm, he was in the habit of including the land as far south as the new county road; in other words, the disputed tract. This is coupled with testimony tending to show that it was part of General Walbridge's plan for making that property his own home to extend *the mansion grounds* south of the old road, and, indeed, as far as the new one.

If the proposed will of 1864 and trust of 1867 showed an intention that, *in case of devolution to others*, this extension should not be appurtenant to the mansion, it was for the jury to determine whether that intention indicated that the testator had not yet regarded it as so appurtenant. And if it indicated that he did not at those periods regard this land as surrounding or appurtenant to the mansion, it was for them to determine whether he had come to have a different view when he made his last will. On this latter question a comparison of the two wills has a bearing.

In the will of 1864 the testator described the lands devised to his wife as sixty acres lying north of the old county road; in his last will he described Ingleside, which he devised *eo nomine* as *sixty-five* acres. To meet this difference of measurement the plaintiff claimed that a resurvey showed that the land *north of the old county road* amounted to about sixty-five acres, and, therefore, satisfied the definition of Ingleside. But it is nothing to the purpose to show the actual

quantity, if the testator spoke on a different assumption. To him the number of acres contained in the tracts purchased from Stone and from Hewlings, trustee, was known only by the maps attached to his deed of purchase, and in this way the aggregate was known as sixty acres. When he stated in his last will that Ingleside contained sixty-five acres, the jury had a right to believe that the testator intended to include more than what had been known to him as sixty acres. And if the jury believed that the testator was aware that sixty-five acres carried Ingleside south of the old road they had a right to determine whether the additional five acres was his approximate estimate of the strip between the old and the new roads. Again, they had a right to consider the value and meaning of this statement of the number of acres in connection with the testimony concerning the testator's habit of describing Ingleside. We have no right to disturb their conclusions upon these questions, unless we find that it was clearly against the weight of the evidence; and we are of opinion that if they believed the testimony concerning the testator's manner of speaking of Ingleside, they could find no other verdict. We hold, then, that Mrs. Walbridge acquired title to the premises in dispute by the last will of General Walbridge.

This brings us to another and very interesting question.

It is claimed by the plaintiff that, if the testator did devise the land in dispute to his wife, it descended to her daughter, Mrs. Corkhill, as her sole heir; that, by a certain deed of bargain and sale, the latter conveyed it to Heman D. Walbridge, and that he conveyed it to the plaintiff; so that the plaintiff has a legal title on which he must recover. This proposition requires a statement of the transactions to which it refers.

It will be remembered that the legacy of \$110,000 to Mrs. Walbridge was charged upon the devises to the testator's brothers. To secure the payment of \$80,000 of this amount, Heman D. Walbridge executed to Mrs. Walbridge on the

6th of December, 1872, a mortgage, in which he described the mortgaged premises in terms which clearly included the land in dispute as a part of the farm devised to himself. His mortgage contained covenants of title and the usual reservation of the mortgagor's right of possession until default. As a matter of fact, this disputed strip was then in Mrs. Walbridge's possession, and has never been in the possession of the mortgagor or of his grantee, the plaintiff. On the same day Mrs. Walbridge executed a release of the remaining property devised to the testator's brothers from the charge imposed by the will.

Mrs. Walbridge died and Mrs. Helen B. Corkhill, her daughter, became her sole heir and her administratrix.

The notes secured by the above mortgage were not fully paid at maturity, and a new arrangement seems to have been made between Mrs. Corkhill and the mortgagor. On the 6th day of April, 1877, they executed an instrument which recited the fact of the mortgage, the description of the mortgaged premises contained therein, the satisfaction of the mortgage debt, the right of the mortgagor to a reconveyance, and to have the premises "released and discharged from all lien, claim, &c., by reason of said mortgage deed, and then proceeded as follows.

"Now, therefore, this indenture witnesseth: That the said party of the first part (Mrs. Corkhill) for and in consideration of the premises, and further of the sum of one dollar, &c., has granted, bargained, sold, released, and conveyed, and doth grant, &c., unto the said party of the second part, his heirs, &c., all the hereinbefore-described premises, &c. To have and to hold the same unto and to the use of the said party of the second part, &c., as in his first and former estate, free, released, and discharged of and from all lien, claim, or incumbrance by reason of said mortgage deed." This instrument was signed and sealed by "Helen B. Corkhill, mortgagee," and "Helen B. Corkhill and Heman D. Walbridge, administrators of Jane M. Walbridge," but was acknowledged only by Helen B. Corkhill.

On the same day Heman D. Walbridge and wife executed to George W. Riggs and George M. Wright a deed in trust to secure payment of a promissory note of Heman D. and Horace S. Walbridge to Helen B. Corkhill for \$25,000. This deed contained in its recital of the mortgage the same words of description which were used in the mortgage.

On the 25th day of August of the same year (1877) Heman Walbridge executed a conveyance to Horace Walbridge describing the same land, and thus including the premises in dispute. The above note for \$25,000 being paid, Wright, the surviving trustee, executed on the 12th day of March, 1884, a deed releasing and conveying the premises to Horace Walbridge. Afterwards, on the 4th day of April, 1884, Heman Walbridge again executed a deed purporting to convey the premises to Horace Walbridge, the plaintiff.

This statement will explain the instructions which were asked by the plaintiff and were refused by the court. They contained, substantially, the following propositions:

1. That the deed from T. B. A. Hewlings and others to Hiram Walbridge, dated May 14, 1855; the deed from Helen B. Corkhill to Heman Walbridge, dated of April 6, 1877, and the deeds from Heman to Horace Walbridge, dated respectively 27th August, 1877, and 4th April, 1884, taken in connection with the proof that Jane Walbridge, devisee of Hiram, died intestate, and that said Helen B. Corkhill, as her sole heir at law, inherited from her said mother whatever estate in the premises the said Jane derived under the will of the said Hiram, and also in connection with the provisions of the said will devising the "farm" to said Heman D., and "Ingleside" to the said Jane, establish by uncontradicted evidence, that at the commencement of said suit the legal title to the premises in dispute was in the plaintiff; and this, whether such premises passed by said will to said Heman as part of the "farm," or to the said Jane as part of the tract known as "Ingleside."

2. That in view of the uncontradicted evidence stated in

instruction No. 1, the defendants in this suit, and all parties claiming under the last will of Helen B. Corkhill, are estopped from denying that the said deed of 6th April, 1877, from the said Helen to the said Heman Walbridge, and the said deeds of 27th August, 1877, and 4th April, 1884, from the said Heman to said Horace Walbridge, the plaintiff, had together the effect of releasing and conveying to the plaintiff whatever title, if any, was held by said Helen in the premises in dispute, through and under the said will of Hiram Walbridge.

3. That the acceptance by the said Jane Walbridge of the mortgage dated 6th December, 1872, made to her by said Heman, and embracing the premises in dispute, taken in connection with the deed from Helen B. Corkhill to said Heman, dated 6th April, 1877, and in connection with the other undisputed evidence in the case, work an estoppel in favor of the plaintiff, whereby the defendants are estopped from controverting the title of the plaintiff in the disputed premises.

We have already considered the bearing of the testator's deed of purchase upon the meaning of his last will, and the questions of fact involved in the verdict. The only other question raised by the prayers for instruction above stated, is the operation of Mrs. Corkhill's deed of 6th September, 1877, to Heman Walbridge.

It is insisted, on the part of the plaintiff, that this deed and the mortgage to which it refers describe the premises in dispute, and that, therefore, if Mrs. Corkhill acquired the legal title to the premises under the will, the thing bargained and sold was the legal title so acquired. Counsel say: "Our proposition of law is, that this is not a mere release of a mortgage, but is a deed whose face makes it a conveyance of a bargained and sold title which the grantor, by his deed, purported to have, and is a grant which operates to convey the premises described (here including the premises in dispute); and such grant works an estoppel against

the grantor, and all holding under the grantor, against asserting any claim to said premises so bargained, sold, and conveyed." In support of this proposition he cites the familiar cases of *Van Rensselaer vs. Kearney*, 11 How., 322, and *Bush vs. Person*, admr., 18 How., 85, where the Supreme Court said: "If a deed bear on its face evidence that the grantor intended to convey, and the grantee expected to become vested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding on the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance." He further cited the case of *French's Lessee vs. Spencer*, 21 How., 240, where the same court said: "But the rule has been carried farther, and it is now established that when the grantor sets forth on the face of his conveyance by averment or recital that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the *estate* and binds an after-acquired title as between the parties and privies."

If these very familiar principles of modern conveyancing were applicable to the particular question which is presented by Mrs. Corkhill's deed, it would be of easy solution. But this is not a question of after-acquired estate nor, whether a deed shall have the effect that it purports to have; it is a question of construction. Undoubtedly a grantor is estopped to deny that his deed actually conveyed what it purported on its face to convey, but this principal does not estop him

to deny that it did purport on its face to convey the interest alleged by the grantee. The very authorities referred to by the plaintiff insist upon this distinction, and deal first with the question of construction. The plaintiff himself discussed it. He begins with the following statement of the purport of the deed: "That the deed of Mrs. Corkhill represents her as possessed of the title to the land covered by the deed to Morsell of the 12th day of May, 1855, is plain and express on the face of the deed. It says that she is the mortgagee of that land; meaning, of course, mortgagee as the only heir of the real mortgagee, her mother. It sets forth that unto her mother the mortgage of Heman D. Walbridge of the 6th of December, 1872, * * * conveyed the premises described in said deed of May 12, 1855, to Morsell. It then recites that Mrs. Corkhill is the only child and sole heir of the said Jane M., and that, by reason of the payment of the mortgage, the parties were entitled to a reconveyance of the said described premises, and to have the lien discharged, and, therefore, it proceeds to grant, as above quoted, the specific and exact premises conveyed by the deed of the 12th of May, 1855, to Morsell."

The recitals of a deed could hardly show more distinctly the limitations and particular nature of the interest which the bargainor held and purported to convey. This deed recited that Mrs. Corkhill had acquired from the bargainee legal title in mortgage, and that, by payment of the mortgage debt, the bargainee had acquired a *right* to a reconveyance of that title, and the bargain and sale distinctly purports to convey just what the mortgagee was entitled to have again. This, of course, was whatever had come to the bargainor by the mortgage, and did not include any interest which the bargainor did not derive from the mortgagor, but had independently. Although the mortgage be a legal title, it is not the fee simple absolute of the land, and language in a deed which might be sufficient to convey the latter, will nevertheless be construed as purporting to convey only

the former if that intention is shown by recitals, or by anything within the four corners of the deed. This distinction of the subject-matter of the bargain is maintained in States where a mortgage is held to be a conveyance. *Merrett vs. Harris*, 102 Mass., 492, and *Barnstable Savings Bank vs. Burrett*, 112 Mass., 172; *Pomeroy's Eq.*, Secs. 820 and 972.

The authorities referred to were cases of assignments, but the principle of construction there applied in ascertaining the subject-matter of the bargain and sale is just as applicable when the bargain is between the mortgagee and mortgagor. The question in both cases is, whether the bargain appears, upon the whole instrument, to relate to the mortgage title or to the fee simple absolute of the land. Applying this question in the present case, we think it is plainly and expressly shown by the recitals in Mrs. Corkhill's deed that the bargain and sale related only to the mortgage interest. What is the legal result of this construction of the deed? We think it is clear that the mortgagor, after receiving this re-conveyance, stood just as he did before he executed the mortgage. He acquired thereby no title that he did not have before, and the bargainor sold and parted with nothing which she did not derive from the mortgagor; and this simply because the bargain and sale did not purport to concern anything but the interest so derived. Inasmuch as she derived by that mortgage neither possession nor title to the premises in dispute, but had all the time held these as her own, those rights were not included in the bargain relating to the mortgagor's interest. In short, he did not acquire *title* to the premises in dispute by this deed.

It is worth while, perhaps, to add a single observation. The mortgage included land which undisputedly belonged to the mortgagor; and as to this the re-conveyance or bargain could only operate as a release. It would hardly seem consistent to hold that the same instrument purported to be a bargain and sale of the mortgage interest as to one portion and a bargain and sale of the fee simple absolute as to another portion of the land described.

Exception was reserved as to the admission of evidence to show that Mrs. Corkhill executed this deed in ignorance that the description included the premises in dispute. We question the admissibility of such evidence, but, inasmuch as we hold that no title to the land in dispute passed by this bargain and sale, we think that the admission of evidence tending to show that it passed by mistake could not affect the verdict. The actual verdict would still be the proper one if this evidence had been excluded.

Judgment affirmed.

ROSE BAILOR

vs.

ANNIE DALY ET AL.

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1. Where a bill charges fraud in fact, and plaintiff fails in his proof he cannot be aided under the prayer for general relief.
 2. But this doctrine does not prevent the court from considering other allegations in the bill of such serious irregularities as would, if true, establish that there was no legal sale at all.
 3. Before a sale will be set aside for inadequacy of price alone it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once a suspicion of fraud.
 4. An assignment of a right to file a bill in equity for a fraud committed on the assignor is void, and a bill filed by the assignee for such purpose should be dismissed.
 5. But if it appears that the fund is in court and the court have jurisdiction over it, relief will be granted so far as to give to the assignee such share thereof as he may be otherwise equitably entitled to.

In Equity. No. 20,272. Decided March 12, 1899.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

APPEAL from a decree dismissing a bill filed to set aside a trustee's sale of real estate on the ground of fraud.

THE FACTS fully appear in the opinion.

Mr. C. CARRINGTON for complainant.

Mr. B. F. LEIGHTON for defendants.

Mr. Justice HAGNER delivered the opinion of the Court:

The complainant, Rose Bailor, alleges that her husband, Henry Bailor, in July, 1878, purchased a lot from the defendant, Daly, paid him a small sum in cash and gave his eleven promissory notes, payable at periods of six months, for the residue; and on the same day executed a deed of trust to Dickson, as trustee, to secure the payment of these notes; that Bailor made payments from time to time, and at the time of his death had paid nearly all the notes; and that only one was then unpaid; that Bailor died intestate and childless, and that she remained in the possession of

the house; that Daly, after her husband's death, made various deceptive statements; sometimes that her husband had paid entirely for the property and that she should receive title to it, and at other times, that very little was due; that she made efforts to raise money to pay off whatever balance was due, and made payments to Daly from time to time; but suddenly, without notice to her, and in violation of his promise, Daly sold the property; that there was no proper advertisement; that the lot sold for a grossly inadequate price; that Daly, the trustee, and the purchaser, Burke, colluded to defraud her and caused the property to be struck off for an inadequate sum. She prays that the sale be set aside; that the property may be restored to her, and she be repaid the sums she paid to Daly, which she believes were paid over and above what was really due. The charge is one of fraud in fact, in the very strongest terms.

The parties thus impeached answer, and all deny in the most positive manner the truth of every word of that charge. Daly declares he made no such statements to her as are charged; that she did pay him \$71, which discharged one of the notes, with interest, and also a small balance due on a previous note; but the last two notes were entirely due and had never been reduced in any way; that he never knew Burke until the afternoon of the day of sale; that he had no idea of buying the land, and tried his best to make it sell for the largest sum he could, and employed a person to bid for it. The answer of the trustee is equally explicit. He insists he did nothing but his duty; that he was anxious to go to Europe, but was, unwillingly, detained by this business, and never had seen Burke prior to the sale. Burke, the purchaser, declares he was in the habit of keeping a lookout for purchases, to invest his money wherever he thought he could get a bargain; that he knew nothing about this property or the parties until he read the advertisement in *The Star*, and in consequence of that notice he attended the sale and purchased the lot, and believes he

gave a fair price for it. He further asserts that to his knowledge he never saw Daly, nor the trustee, until after the sale.

These answers conclusively dispose of the charge of collusion and fraud, unless their force is destroyed by the evidence. But the complainant has failed to sustain the averments of her bill by the evidence; her own testimony does not support her allegations, and the witnesses whom she produced testified only to immaterial matters. The evidence given by a number of witnesses on the part of the defendants confirm the statements in the answers. The charge of fraud, in fact, having thus failed, there can be no relief under the prayer for general relief, according to the familiar principle stated in *Clark vs. Krause*, 2 Mackey, 559, which was laid down by the Supreme Court in *Eyre vs. Potter*, 15 How., 42.

But as far reaching as this principle appears to be, it should not prevent us from considering other allegations in the bill of such serious irregularities as would, if true, establish that there was no legal sale at all.

One of these is the want of proper notice. The property was advertised in *The Evening Star* on the 19th, 20th, 22d, and 23d of June, 1885, and the sale took place on the day last named. The notice was rather scant; but the property was a small lot, in a very unattractive locality; and in view of the serious expense of advertisements, the trustee may have been justified in thinking that would be a sufficient expenditure of money. There is nothing to show there was any unusual absence of persons at the sale, the proof showing fifteen or twenty persons were in attendance. Nor is there anything to show that the lack of notice caused loss to any one. There is nothing, therefore, in the allegation of want of proper notice.

Another complaint was that the auctioneer, on the day of the sale, set up a flag on the fence in front of the adjacent house. There were two small houses lying together, with a fence common to both, and the person who was sent down

to put up the flag placed it front of the house adjoining. Burke, the purchaser, who went to examine the property, entered the wrong house, misled by the flag. But he was instantly told of his mistake by the inmates; and the blunder was rectified as soon as the auctioneer came on the ground. No other person appears to have been misled, and there is nothing in the circumstance to justify the court in setting aside the sale on this ground.

The next objection is inadequacy of price. The land was bought by Bailor for \$600. It was stated he had improved it to some extent, but the testimony on that subject is by no means clear, and there are many witnesses who say it was not in as good condition at the time of the sale as it was when he bought it. It sold for \$370, and the last bid was by a man named Williams, who was carried there by the beneficiary, Daly, for the purpose of running up the property. It was apparent that Daly did not want the property as he tried to make it sell for as much as he could. The familiar doctrine as to inadequacy of price is, that before a sale will be set aside for inadequacy of price alone, it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud.

There is nothing to prove such gross inadequacy; and particularly in connection with the fact that after the complainant found fault with the sale, Burke offered her the property for \$75 more than he gave; the additional sum representing what he had paid for searching the title and other expenses. That would have amounted only to \$445; and if the charge of gross inadequacy were well founded, we must suppose there would have been no hesitation on her part in availing herself of the offer; but the complainant did not raise the money.

A further question was discussed whether such a suit could be maintained by the widow, who, it is insisted, has no standing in court. The purchaser executed the deed of

trust on the day he received a deed of the property. He, therefore, had but the instantaneous seizen of the land that would not entitle his widow to dower at all. Besides she actually in the deed of trust relinquished her dower, if she had any. After the death of her husband his brother, Samuel Bailor, representing himself as the sole heir of the deceased, on the 18th day of July, 1885, made a quit-claim deed of all his interest to the plaintiff, and she comes into court in November, 1886, under her title as grantee and assignee of the brother, to set aside the sale and the conveyance by the trustee to the purchaser, in June, 1885, one month before the quit-claim deed.

Her right to sustain such a bill is more than questionable. Assignees of choses of action are recognized more freely in equity than at law, but there are limits to such recognition. Some of the assignments the courts will not recognize are described in Section 1040, *h*, 2 Story's Eq. (note 1).

"So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor, would be held void as contrary to public policy, and as savoring of the character of maintenance; so, a mere right of action for a tort is not, for the like reason, assignable. Indeed, it has been laid down as a general rule, that, where an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to upset a local instrument, or to maintain a suit."

Lord Abinger in *Prosser vs. Edwards*, 1 Yonge & Cole, 481, 496-499, says:

"My present impression is that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud; and I should say that some authority is necessary to show that a man can assign to another a right to file

a bill for a fraud committed upon himself. * * * In the present case it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase.

* * * It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against public policy. All our cases of maintenance and champerty are founded upon the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

In this case the assignor, Samuel Bailor, did not file a bill to set aside the sale, but it is his assignee who sues, by virtue of that assignment. No right of action is given in the assignment; if such right passed it was merely by implication. It may well be questioned whether she would have any standing in the court, except for another consideration appearing in the case. It is a familiar principle that where the validity of a sale by a conventional trustee is in litigation, the court may assume jurisdiction of the accounts of the trustee, sometimes compelling him to give bond if necessary. It appears there was a balance of about \$180 remaining in the trustee's hands after he had satisfied Daly's debt and the expenses of sale. The widow claimed it all; but a claim was also made on the trustee by persons representing themselves as children of a sister of Henry Bailor for one-half of this balance, and the trustee only paid the widow about \$90 as her share as assignee. But it is shown she had paid \$70 to the trustee on account of one of the notes, which she was under no obligation to pay; and she ought to be re-imbursed that amount out of this fund. The trustee has retained the balance after paying the widow the \$90. We think the cause should be retained and re-

manded for settling the distribution of this balance. In the settlement she should be re-imbursed the \$70, and then the half of what would remain of the \$180 should go to her and the other half to the other claimants if they prove to be entitled, otherwise she should have it all. We affirm the decree below so far as it allows the sale to stand, but remand the cause to allow the parties thirty days in which to apply for an accounting and proper distribution of the money. This is a trifling case, except to the parties, some of whom, except the complainant, are poor colored people, but we have examined it with as much care as if the parties were more important persons and the amount was a very large one.

GEORGE M. ROBESON

vs.

SAMUEL V. NILES ET AL.

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1. Services performed by plaintiff for the testatrix during her lifetime in expectation of receiving a legacy will not deprive him of his right to bring suit for such services against the estate of the deceased; nothing short of an understanding between the parties would have that effect.
 2. The provision of Sec. 18, subch. 8, of the Statute of Limitations, providing that claims against an executor or administrator shall be prosecuted within nine months, &c., being an exceptional abbreviation of the general Statute of Limitations, should receive a construction almost penal in strictness.
 3. Hence it does not apply to a case where the claim originally rejected is different in form from that sued on; as where the original claim was for a certain sum for services rendered as attorney *and trustee*, while that sued on is for a less sum and for services as attorney only.
 4. In equity the Statute of Limitations being regarded rather as one of presumption than of repose, the court will lay hold of any facts in the case which would show it to be inequitable to apply the bar with the same rigor that would prevail in a court of law.

In Equity. No. 2,032. Decided March 26, 1889.

The Chief Justice and Justices HAGNER and JAMES sitting.

APPEAL from a decree of the Special Term dismissing complainant's bill.

THE FACTS are stated in the opinion.

Mr. FRANK W. HACKETT for plaintiff:

The bill was not multifarious; the order sustaining the demurrer of Children's Hospital was error. The parties claiming to be residuary legatees (of whom the hospital was one), were interested in the decision of each question.

The order sustaining the demurrer was not appealable. *Parsons vs. Parker*, 4 Wash. Law Rep., 145. The General Term may now reverse this order—the whole record being here. By amending we have not lost our right to have this order reviewed. *Teal vs. Walker*, 111 U. S., 242.

Defendants should not have had leave to amend their

answer. The text of 1 Daniell's Chancery Practice, 409, that any amendment, however trivial, authorizes a defendant to make a new defence is based on what the vice-chancellor is reported to have said in *Bosanquet vs. Marsham*, 4 Sim., 573. But that was the case of *adding* something to the bill. The true rule is stated in 7 G. & J., 387: "Whenever a bill is amended by the introduction of a new fact, a defendant has a right to answer such an amendment. Our Equity Rule 33 treats of amendments that add parties on new facts. It has no application here where we simply struck out a part of the bill, and introduced not a single fact.

Our bill is not barred by the special statute. The requirement as to exhibiting claims to an executor is a penal provision and must be strictly construed; *Hoyt vs. Bonnett*, 50 N. Y., 543. We rely on the construction of the language of this statute, now a part of the Maryland Code, in *Coburn vs. Harris*, 53 Md., 367. Compare *Zollickoffer vs. Smith*, 44 Md., 375.

It is against conscience that defendant set up the Statute of Limitations after plaintiff had withdrawn the account at defendant's request; *Calahan vs. McClan*, 47 Barb., 206. Mr. Niles' letters operate as an estoppel; *Pickard vs. Seers*, 6 Ad. & E., 469.

Nor is the plea of the general statute a valid defence. *Johnson vs. Beardsley*, 15 John., 3; *McCann vs. Sloan*, 25 Md., 575. The services were rendered upon an understanding that gave Mr. Aulick the right to make out his account *in solido* after Mrs. D's death. The services were rendered under an implied contract; *Martin vs. Wright*, 13 Wend., 460. The mere fact of an *expectation* of a legacy does not take away plaintiff's right of action; *Chitty on Contracts*, 591. The court sometimes lays hold of slender testimony to satisfy itself that the person rendering service does not look solely to the generosity of the testator. *Roberts vs. Swift*, 1 Yeates, 209; *Baxter vs. Gray*, 3 M. & G., 770; *Grandin vs. Reading*, 19 N. J. Eq., 370. The language of

Lee vs. Lee, 6 G. & J., 316, is not quite correctly given in *Bantz vs. Bantz*, 52 Md., 693.

For nearly eight years Mr. Aulick's judicious and faithful management not only preserved this estate in its integrity, but added largely to its value. His services, rendered continuously during this period (for he attended upon his aunt every day), were worth at a moderate estimate at least \$10,000. Messrs. Niles and Galt received for their services in settling the estate (not at all laborious) 10 per cent., or \$19,829.06.

Messrs. R. ROSS PERRY and REGINALD FENDALL for defendants.

Mr. Justice HAGNER delivered the opinion of the Court:

This is a bill in equity filed on the 12th of July, 1884, by Robeson and Niles, administrators of J. Wily Aulick, against Niles and Galt, executors of Mrs. Dykeman, and a number of charitable institutions which were residuary legatees under Mrs. Dykeman's will. Mr. Niles objecting to remaining as co-complainant with Robeson as one of the administrators of Aulick, he was afterwards made a defendant instead. The object of the bill was the recovery of \$10,000 which Robeson, as administrator, insisted was due to J. Wily Aulick for services as agent and attorney of his aunt, Mrs. Dykeman, in the management of her property for a period of seven and a half years next preceding her death.

As Mr. Niles would necessarily sustain the relation of plaintiff and defendant, the suit could not be brought at law.

Under a marriage settlement with her husband, Aulick was the trustee of Mrs. Dykeman; and he sustained that relation to her until 1874, when her husband died; and the claim of the complainant is that Aulick from that time forth attended to Mrs. Dykeman's affairs in the capacity of agent and attorney, and no longer as her trustee.

Answers were filed by the executors of Mrs. Dykeman, and by the residuary beneficiaries.

Upon application by the executors of Mrs. Dykeman to dismiss the bill for multifariousness, the court below decided that the application of the complainant to procure a construction of the will of Mrs. Dykeman, and a judgment as to the validity of the bequests, could not be properly joined with the claim for services; and the complainant was required to amend his bill by striking out as defendants all the beneficiaries who were residuary legatees. To the bill as thus amended, Niles and Galt, executors of Mrs. Dykeman, then filed an answer. Afterwards, on application, they obtained leave to amend this answer, and made the amendment by interposing by way of answer the Statute of Limitations to the claim in two forms: first, that the cause of action accrued more than three years before the filing of the bill; and, second, that the suit on the claim was not brought within nine months after it had been disputed and rejected by the executors of Mrs. Dykeman, as was required under section 18, subchapter 8 of the testamentary law of 1798, Ch. 101.

The complainant resisted the motion to amend; and afterwards moved to strike out these defenses, but his objections were overruled below.

It was urged here that we should, on this appeal, review the several orders of the court below authorizing this amendment of the answer, and allowing the defenses of limitation to stand, as well as the other interlocutory orders passed by the court below. But no appeal was taken from either of these orders when they were passed, and we are of opinion that we are not in a position now to review their correctness.

On final hearing the court below dismissed the bill upon the ground, as we are told, that the nine months' plea of limitations was applicable to the case.

1. The first question to be considered is, whether Wily Aulick had a just claim for services as set up by the complainant.

A large part of the testimony in the case upon the part of the complainant was given by Mr. Robeson, the plaintiff, one of the administrators of Wily Aulick. Of course his testimony under the evidence act (as construed in *Page vs. Burnstine*) would not be admissible as to any statement made to him by Aulick in support of his claim; although it would be competent with respect to his knowledge of the extent and value of Aulick's services. But as the answer of Niles, his co-representative of Aulick's estate, and co-equal in authority in its administration, denies the rendition of such services, we have preferred to omit Robeson's testimony altogether from our consideration.

The other evidence on that subject, however, we think is ample to sustain the contention of the complainant, that valuable and continuous services were rendered by Wily Aulick as claimed, as agent and attorney of Mrs. Dykeman. Mr. Palmer, who describes himself as an intimate acquaintance of Wily Aulick and Mrs. Dykeman, testifies in the most satisfactory way on the subject; and from what he says there can be no doubt that Wily Aulick was attending assiduously to all the business affairs of Mrs. Dykeman during all the time referred to. As evincing his zeal in this service, two of the witnesses testify that when advised by his physician to leave for Europe for the benefit of his health, when suffering from illness, he refused to go, because, as he said, he could not leave the business affairs of his aunt, Mrs. Dykeman.

Mrs. Dykeman possessed a valuable estate, consisting in part of a large number of shares in a gas company in Cincinnati, which were extremely valuable and yielded a large income. Another item of her property was a large amount, some forty odd thousand dollars, of United States stock. She had also two valuable houses, which required frequent repairs, as rented houses usually do; and all her matters of business of every description were attended to by Aulick, including the change of investments, collection of dividends

and rents, investment of surplus, receipts, &c. For a long time before her death he was in the habit of attending also to such details of her business as drawing checks for her signature, but after her health became more impaired she gave him a power of attorney, authorizing him also to sign her name to checks on her bankers. In fact, he appears, according to this witness, to have been her universal agent.

Judge Aldis, a tenant of one of the houses, stated that Mrs. Dykeman was a lady unversed in business, who required somebody to attend to her business affairs; that she had selected Wily Aulick as her agent; and that he had business transactions with Aulick as such. To the same general effect is the testimony of Mr. Bliss.

Another of the witnesses, Bridget Corney, who for fifteen years was a personal attendant on Mrs. Dykeman, testifies that Mr. Aulick was indispensable to her; that she placed every reliance upon him, and that he was constantly doing everything for her that was needed.

Without further repetition of the evidence we content ourselves with stating as our conviction that the proof is ample that valuable services were rendered by Aulick, as claimed in the bill.

Various defenses were interposed by the defendants to the claim.

2. It is said, in the first place, that Aulick had been paid for whatever services he had rendered to Mrs. Dykeman by the permission, or option, given him of taking a number of additional shares of gas stock, which might be issued by the gas company, based upon the application by the company of part of its earnings to additional plant and improvements. These additional shares receivable by him at par, were salable at a higher rate, and the difference was his gain. This privilege he availed himself of in two instances and his profit, the executors insist, should be regarded as full compensation and discharge of the present claim.

This option was given in 1874, as appears from the paper in evidence signed by Mrs. Dykeman. It is addressed to J. Wily Aulick, trustee for Mrs. Dykeman, and is in these words:

"In the event of the Cincinnati Gas Light and Coke Company issuing additional new stock, subsequent to this date, I authorize you to subscribe, for your own personal benefit and use, for such additional stock as may be issued to you as my trustee, providing you furnish the funds for the payment of the same.

"I also authorize you to sell the same for your own personal benefit and gain.

"I intend this as a compensation for such services as you have heretofore rendered, and may hereafter render me, as my trustee, in the transaction of my business with the Cincinnati Gas Company."

The original claim filed in the Orphans' Court in April, 1883, was for \$15,000 alleged to be due to Wily Aulick for services as trustee and attorney, but the present claim for \$10,000 omits any charge for services *as trustee*. The services described in the option are only such as Aulick may have rendered and may thereafter render to Mrs. Dykeman *as her trustee*, and were only for services "in the transaction of her business with the Cincinnati Gas Company," while the present claim is for seven and a half years service rendered after 1874, as *agent and attorney*, and is not confined to services rendered in connection with the "business with the Cincinnati Gas Company," but embraces Mrs. Dykeman's business of every description.

Among the papers filed in the case are several letters from Mr. Niles to Mr. Robeson. All those which are offered by Mr. Niles in his own behalf are not admissible, under the impregnable rule that a party's own declarations will not be received in evidence in his own favor.

One of these letters, however, was offered by the other side. In this Niles states to Robeson that when the will of

Mrs. Dykeman was in course of preparation, he called her attention to the amount of the legacy she proposed to give to Aulick, which was only what she had provided for other nephews and neices, and suggested its increase, stating that Wily might think he had a special claim to more liberal provision, because of the services he had rendered to her; and that she replied she did not think he could make such a claim, because she had remunerated him for his services by the gift of the option for the gas stock, and for that reason he had no right to expect a larger legacy than that given to her other nephews.

But this conversation could not have occurred later than 1876, the time of the execution of the will, and may have been considerably before that date; while almost all the services here claimed for are alleged to have been rendered since 1876. Again, the testimony of Bridget Corney is positive that Mrs. Dykeman told her she was willing Wily should charge for his services; that he had the right to charge her as other people would for attending to her business, and if he did charge her he should be paid.

We think there is nothing in the case to sustain the objection that the services now sued for have been remunerated by the option on the gas stock.

3. It is next contended that all services rendered for Mrs. Dykeman by Mr. Aulick were performed by him in the expectation of receiving compensation by a special legacy larger than those given to other relatives, which was to be the only remuneration for his services.

There is no testimony at all supporting this contention, unless the statement of Mr. Niles already given could be considered as evidence; and conceding its admissibility, the supposed expectation on Aulick's part would not in law prevent his prosecution of this claim.

We understand the law to be that the mere fact of the services having been performed in the *expectation* of receiving a legacy would not take away the plaintiff's right of

action; and nothing short of an *understanding* between the parties would have such an effect. Chitty on Contracts, 591. Or, as expressed by Chief Justice Tyndall in *Baxter vs. Gray*, 3 M. & G., 770. "If the work and labor were performed under a hope of a legacy, I see no reason why the plaintiff should not on such hope failing him, be, as it were, remitted to his legal right." Besides, according to Niles' statement Mrs. Dykeman expressly denied that she had any thought of compensating Aulick by a legacy.

But although there is no testimony affirmatively tending to show that Aulick rendered these services in expectation of a legacy, yet there is strong evidence the other way. Palmer testifies that he knows Aulick always expected to claim compensation; and that up to three days before his death he actually made the claim; complained because he was put to trouble by Niles in being required to present it in form, and gave the particulars of his claim to his counsel to bring suit.

4. It is again asserted by Mr. Niles in one of his letters to Robeson that he knew Wily Aulick had abandoned the claim. Mr. Niles was not examined as a witness, and this statement in his letter, produced by himself, is not admissible. But if we could consider it, we think it is entirely overcome by Palmer's distinct evidence that up to within three days of his death Wily Aulick had no purpose of abandoning his claim.

5. The next point relied upon is the defense of limitations.

First, as to the nine months' limitation. The language of the subsection is: "If a claim be exhibited against an executor or administrator, which he shall think it his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the claim, etc.; and if on any claims exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, the said creditor

or claimant shall be forever barred; and the executor or administrator may plead this act in bar, together with the general issue, or other plea proper to bring the merits of the case to trial."

This provision of the statute is one which upon principle should be strictly construed, since it is nothing less than an exceptional abbreviation of the general Statute of Limitations. If the creditor does not conform to this special requirement and bring suit within nine months after his claim has been presented and disputed, more than two years shall be taken from the time allowed to creditors generally by the statute.

Under the authorities such restrictions should receive a construction almost penal in strictness. The decisions of the courts of New York upon similar provisions are to this effect. *Hoyt vs. Bonnett*, 50 N. Y., 543. And the Court of Appeals of Maryland has recognized the principle in its construction of this subsection of the statute.

In 9 Maryland, *Peterson's Executors, vs. Ellicott*, 52, it appeared the plaintiff had sent his claim to the executors of Peterson, the defendants, by a friend with a demand for payment. They refused to pay, and "disputed" and "rejected" the claim; and more than nine months afterwards suit was brought. This provision of the statute was pleaded; and the court below decided that if the claim had been presented in the manner just stated, and Peterson's executors then disputed and rejected it, and the suit was not commenced until the expiration of more than nine months thereafter, there could be no recovery. The Court of Appeals reversed the decision upon the ground that it did not appear affirmatively that the person who had presented the claim was the agent of the plaintiff. Recognizing that this provision of the statute was exceptional in character, and therefore to be strictly construed, the court held that the subsection required the presentation of the claim should be made either by the plaintiff himself or by his agent for

that purpose authorized; and upon this ground alone it declared the subsection inapplicable and refused to defeat the suit.

The first claim, as we have seen, was filed in the Orphans' Court, and the present claim was first exhibited with the bill on the 12th of July, 1884; and never was presented to the executors of Mrs. Dykeman in its present form until the bill was filed. The amended answer of the executors, in which this subsection is relied on, averred that on June 5, 1883, "the claim as set forth in the original bill was exhibited against them, and by them on said day disputed and rejected, of which the plaintiff had notice." But of course the claim thus referred to must have been the claim for \$15,000, as the present claim was not filed for more than a year afterwards; and they could not, in June, 1883, have rejected a claim which was not filed until July, 1884.

Furthermore, the present claim never was proved by the administrators of Aulick as required by the testamentary acts, nor filed in the Orphans' Court at any time.

In 53 Maryland, 367, *Coburn vs. Harris*, it was decided that the rejection of a claim, so as to meet the requirements of this subsection of the statute, must be of a claim which had been previously sworn to and presented to the administrator or passed by the Orphans' Court. The court says: "Yet, unless so authenticated it is not in a form entitled to be paid; and therefore when Section 108 (which is this subsection in words) provides for the consequences which shall follow the rejection of a claim when exhibited against an administrator, it imports that the claim shall be exhibited in such form as that the administrator may be protected in paying it. The rejection or refusal to pay a claim not authenticated, is not such a refusal or rejection as is contemplated by the code, and imposes no obligation on the creditor to sue thereon within nine months. It stands as if it had never been exhibited."

These are decisions upon this subsection by the courts of a State where the law was enacted; and they are, in my

opinion, entitled to such peculiar weight that it seems unnecessary to look for decisions elsewhere.

As the claim before us was not presented to and rejected by the executors nine months before the filing of the bill, we think the special plea of limitations has no application to the case.

6. The next defense relied on is the three years' bar of the Statute of Limitations; and this we think is well taken. The complainant's claim is within none of the exceptions of the statute; and if Aulick delayed a settlement with his aunt during all this long time, his own leniency or neglect has borne the usual fruit.

The complainant, however, insists the executors have waived the defense of the three years' bar of the statute; and he relies upon sundry letters written by Niles as one of the executors, to Robeson, as administrator of Aulick, and to his counsel, as amounting to such waiver. These letters contain a great many declarations of Niles' disposition to treat the demand throughout as an amicable claim, which should be considered as a family controversy, and settled without a suit; and they certainly go far to evince an entire absence of any intention on the part of the executors to plead the Statute of Limitations. But we think they fall short of such an admission by them of an existing debt which they are willing to pay, as would be sufficient to disentitle the executors to interpose the statute as a defense, as they afterwards did in their amended answer.

Mrs. Dykeman died on the 23d of May, 1882, and this bill was filed on the 12th of July, 1884. The statute strictly applied, would exclude the recovery for any services rendered before the 12th of July, 1881; which would leave only about ten months' services before her death unaffected by the bar. But in equity, where the defence of limitations as a general thing is said to be recognized upon principles of analogy, and the statute is regarded rather as one of presumption than of repose, the court will lay hold of any facts

in the case which would show it to be inequitable to apply the bar with the same rigor that would prevail in a court of law. Here the executors of Dykeman, having full discretion to withhold this defense, after discussion with Wily Aulick during the six months he survived Mrs. Dykeman, and repeated conferences with the complainant, as his administrator, for more than three years afterwards, determined in March, 1886, to interpose the plea of the statute in their amended answer to the claim which had been filed with the bill since July, 1884. During this interval the various letters of Mr. Niles, executor of Mrs. Dykeman, were written.

Robeson, in behalf of himself and Niles, as administrator of Aulick, having proved and filed in the Orphans' Court, in June, 1883, the claim for \$15,000, for services as trustee, as well as agent, afterwards withdrew it on the request of Niles. The letters were written with reference to this claim and request. The first we refer to, under date of December 29, 1883, is in this language:

"Hon. GEORGE M. ROBESON:

"DEAR MR. ROBESON: See your counsel, Mr. Hackett, please, and request him to withdraw at once from the office of the Register of Wills the claim as sworn to by you against the estate of Mrs. Dykeman. The account is in every way irregular and in conflict with the facts as developed, and if it remains in the office it will do no possible good, and only be a cause of embarrassment in the settlement of our account. As your claim now stands, it is for a *quantum meruit* for services performed since the termination of the trust; and, if Mr. Hackett will prepare the same in regular form and submit it to Messrs. Blair and Meloy for arbitration the claim can be decided in a very short time, as the Children's Hospital, of which I am the representative, will agree in whatever conclusion reached.

"I now give you the same pledge, with the further assurance that the residuary interest in our hands, and which is

derived exclusively through the sale of real estate, and over which the Probate Court has no control, directly or indirectly, will be held by us subject to the final settlement of this claim. You, of course, can ask nothing more, as your case will not be in the slightest degree prejudiced by conforming to my request; and I, therefore, will regard it as a favor if you will have the account withdrawn at once."

Again he writes, in January, 1884:

"I desire to state that by conforming to my request the interest of the estate which you represent will not in the slightest degree be prejudiced, as I have given you my pledge, and I now renew it, that the residuary funds now in the hands of the executors of the estate will be held by them until the matter of the payment of this account has been adjusted between the residuary legatees and yourself."

There are several other letters to the same effect. When the defendants come into a court of equity and ask the court to apply the Statute of Limitations in their behalf, we think they should be made to do equity; and, inasmuch as the complainant, as we must assume, would at the time he received these assurances, have brought suit, except for this pledge, the intervening time ought not be reckoned against the claim; and the statute should not operate further back than three years before December, 1883; that is from 29th December, 1880.

7. Next as to the amount that should be allowed. The estate of Mrs. Dykeman amounted to about \$200,000. It seems to be assumed that her income was at least \$10,000, of which at least \$6,000 was used annually in investment by Aulick as her agent.

It happens that during the latter part of her life, within the period not barred by the statute, and while this lady was practically unable to attend to any business, we have strong proof of the importance and value of Mr. Aulick's services. Mr. Hyde, of Riggs & Co., testifies to a transaction in which Aulick sold some \$38,000 of Government

stock which was about to be redeemed, at a good price, and the proceeds, with other funds probably derived from the surplus income, was invested in other bonds to the amount of \$40,000. This was a transaction of very considerable importance and Hyde thinks was very judiciously conducted. The incident serves to illustrate the importance of Aulick's duties as agent.

By the will of this lady, her brother was given \$35,000; her nephew, J. Wily Aulick, \$15,000; two other nephews, Francis Conover and Richard Conover, \$15,000; each of her nieces, Rachel Baker and Helen Louise Morris, \$15,000 each; and her grand-nieces, Julia M. Stout and Mary M. Stout, \$10,000 each, and so on. None of these legatees ever moved a finger to manage any of this business, which was conducted all this time by Wily Aulick—the estate increasing year by year under his judicious management, which resulted in the accumulation of a large fund in which the residuary legatees may participate. The rendition of valuable services by Aulick is established to our entire satisfaction; and in view of the short time for which he can be allowed under the defense of limitations, we are disposed to give as large a sum annually as we can. Mr. Johnston testified that it was customary to pay an agent for the services he described (not embracing, as we understand, various duties performed by Aulick), from \$1,000 to \$1,200 annually; and we have concluded that the larger sum per annum would be but fair remuneration for the services rendered by Aulick, to be computed from December 29, 1880, to May 23, 1882, the date of Mrs. Dykeman's death.

The decree of the court below will be reversed and a decree signed directing the payment of this amount with interest from the last-named day.

CHARLES R. MONROE & CO.

vs.

EDWARD J. HANNAN ET AL.

1. The mechanic's lien act of 1884 does not extend to the subcontractor of a subcontractor so as to give the latter a lien upon the property.
2. *Spalding vs. Dodge*, 6 Mackey, 289, explained.

In Equity. No. 11,172. Decided April 8, 1889.
Justices HAGNER, JAMES and BRADLEY sitting.

APPEAL from a decree of the Special Term upon a bill to enforce a mechanic's lien.

Messrs. WOODBURY WHEELER and JAMES HOBAN for complainants:

No reference to the auditor of the court was necessary; *Koons vs. Schaffer*, 27 Md., 83; 31 Md., 568. The court ascertained the amount.

The lien law gave Monroe & Co. a right to furnish the bricks and to be paid for them the amount as ascertained by the court. *Spalding vs. Dodge*, 6 Mackey, 289.

The law is to be liberally construed in favor of lienor. *Mining Co. vs. Collins*, 104 U. S., 176.

The defendants having filed a bond under the statute and obtained a release of their property are estopped from questioning the constitutionality of the law. *Daniels vs. Tearney*, 102 U. S., 415; *U. S. vs. Hodson*, 10 Wall., 395; *P., W. & B. RR. Co. vs. Howard*, 13 How., 307.

Monroe's liability is to be strictly construed. *McMicken vs. Webb*, 6 How., 292; *Miller vs. Stewart*, 9 Wheat., 680; *Sprigg vs. Bank of Mt. Pleasant*, 14 Peters, 201.

Even if liable beyond the terms of the bond, the change in the contract released him. *Martin vs. Thomas*, 24 How., 215; *Reese vs. U. S.*, 9 Wall., 13; 36 Minn., 439.

In no event could Monroe be liable beyond the penalty of the bond, viz., \$500. *McGill vs. Bank of U. S.*, 12 Wheat., 511; *Humphreys vs. Leggett*, 9 How., 297.

Mr. SAMUEL MADDOX, for defendant:

Apart from the peculiar facts of this case, it is manifest that the mechanic's lien law in force here does not give any person a lien who occupies the relation that Monroe does to Hannan. *The right of lien stops at the subcontractor.*

The liability of an owner ends with obligations imposed on him by his agent, the contractor. To carry it further would be to deprive him of his property without his consent and without due process of law, and would render the law unconstitutional and void.

The claims of workmen and materialmen do not become liens on a house from the mere fact that the work was done or the materials furnished for its erection, but they must be founded on a contract, express or implied, direct or indirect, with the owner of the estate sought to be charged. The law says the lien shall attach "for the payment for work or materials contracted for" on "every building hereafter erected or repaired by the owner or his agent." With whom must the *contract* be made? Not with a mere trespasser, or one having no title to the land. Not with one who has derived from the owner no right to build. No one has the power to contract so as to give the right of lien except the owner and his immediate contractor.

This is the construction put upon similar laws by the State courts by uniform decisions, a few of which only will be noticed.

The law of Illinois, 1869, provides that every subcontractor, mechanic, workman, or other person who shall, in conformity with the terms of the contract between the owner of the land and the original contractor, perform any labor or furnish any material in building the houses, &c., shall have a lien for the value of the work or material.

The labor employed under a subcontractor is not pro-

tected by this statute. *Rothberger vs. Dupuy*, 64 Ill., 452.

This law does not extend the lien of mechanics and materialmen beyond the first subcontractor. *Ahern vs. Evans*, 66 Ill., 125.

The party furnishing materials to a subcontractor not entitled to lien. *Newhall vs. Castins*, 70 Ill., 156; *Bridge Co. vs. Rwy. Co.*, 72 Ill., 506.

And in Wisconsin, where the law is very similar, a like construction was given to it. *Kirby vs. McGarry*, 16 Wise, 70.

The law of Pennsylvania, which is perhaps nearer like ours in its phraseology than that of any other State, has been frequently construed by the Court of Appeals of that State, and it has been uniformly held that there must be privity between the owner and the subcontractor to enable the latter to charge the building with the lien for the lumber he purchases of others in order to fill his own contract. *Duff vs. Hoffman*, 63 Pa. St., 191.

Materials furnished a subcontractor will not give a lien. *Harlan vs. Rand*, 27 Pa. St., 511; *Smith vs. Stokes*, 10 Weekly Notes of Cases, 6.

And a late law of that State, intended to extend the provisions of the laws of 1836 and 1845, so as to give a right of lien to the contractors and employees under a subcontractor, has recently been declared unconstitutional and void. *Titusville Iron Works vs. Keystone Oil Co.*, 22 Weekly Notes of Cases, 435.

In the case at bar the bill does not aver, nor does the evidence show that there was any privity of contract between the complainants, *Monroe & Co.*, and the defendant, *Hannan*, or his agent, *Goodwin*.

Mr. Justice HAGNER delivered the opinion of the Court:

This bill was filed by *C. R. Monroe & Co.* to enforce a mechanic's lien against *Edward J. Hannan*. *Hannan*, the proprietor of sundry lots, in February, 1888, entered into a contract with *Goodwin*, under which the latter undertook to build eleven houses on these lots for \$13,683. In the

same month Ward & Mockabee made an offer to Goodwin to do the brick-work under his contract on the buildings, in these words:

“Mr. GOODWIN: We will agree to furnish material and to build and complete the brick-work on eleven houses on the corner of Tenth and G streets southeast, according to plans and specifications, for \$4,481. Ward & Mockabee.”

Goodwin not being acquainted with these parties, required them to execute a bond to secure the owner; and on the 15th of February Ward & Mockabee entered into a bond with Monroe, one of the plaintiffs, as their surety, with this condition: “Whereas, the said Ward & Mockabee, on the 15th day of February, 1888, have agreed to build all the brick-work on eleven houses on the corner of Tenth and G streets southeast, in Washington, D. C., for the sum of \$4,481 in a complete and workmanlike manner: Now, if the said Ward & Mockabee shall well and truly keep and perform all and each of the covenants herein contained, then this obligation to be null and void, otherwise to be and remain in full force, effect, and virtue in law.”

The buildings were commenced, and the work proceeded until early in April, when some differences about payment occurring between Hannan and Ward & Mockabee, the latter, according to Hannan's statement, declared they had abandoned the job and proceeded to tear down the scaffolding and throw down the ladders. Hannan appeared on the ground and asked for an explanation of their conduct; whereupon Ward declared they did not intend to do another particle of work there, and he was actually engaged in throwing down the poles, etc., when Hannan interfered and Ward was then put off the buildings.

Hannan further testified that he went at once and informed Monroe that Ward & Mockabee had thrown up the contract, and called upon him as surety on the bond to complete the buildings, and declared that in default he would hold him on the bond.

Monroe & Co. had previously made a subcontract with Ward & Mockabee to supply all the brick which were to be placed in the buildings, and had furnished a considerable amount up to that time. After Hannan's visit Monroe went to the buildings and assumed charge of them, and placed O'Neal, who had been the foreman of Ward & Mockabee, in control of the work. The houses were finished in due course of time; payments for bricks being made to Monroe during the progress of the work, of considerable amounts by Goodwin, and also by Hannan.

Many of these allegations of Hannan are controverted by the plaintiffs. They deny that they voluntarily abandoned the work, but insist that Hannan wrongfully discharged them. They also insist that Monroe completed the work under a special employment by Hannan, after Ward & Mockabee left the buildings, and not in his character as surety on the bond. There is a considerable mass of testimony on these points, but we have no hesitation in saying that the weight of the evidence is decidedly in support of the statement of Hannan upon each of the controverted points. After the work was completed the complainants made out their bill for \$1,184.66 as the balance due them, after giving the proper credits, with the heading, "Ward & Mockabee to C. R. Monroe & Co., Dr.;" and Monroe & Co. brought suit upon the account and recovered a judgment against Ward & Mockabee for this amount. Hannan alleged in his answer that he had paid all of the \$4,481, stipulated to be paid for all the brick-work, excepting the sum of \$200. Afterwards he said that on a recast of the account it appeared he owed but \$83, and that amount he then deposited in court. At a later period, after he and Goodwin had re-examined the accounts, it was testified that only \$53 was due. But it is plainly proved that Hannan has paid all of the \$4,481 except a small sum, and that no such amount as \$1,184 remains unpaid by him on the contract with Ward & Mockabee.

If Hannan were decreed to pay the complainant's claim, it would not be because he has not paid all he contracted to pay, and the full value of the work, but because the claimants have secured a legal advantage by force of the statute that would compel him to pay again a part of what he has once paid.

The bill presents the important question, whether the subcontractors under subcontractors have the right to invoke the provisions of the Act of 1884, which gives a lien upon the property of the house-owner to the contractor, *subcontractors*, materialman, journeymen, and laborers, for work done and materials furnished.

It is one that concerns a large class of people in this community, and its proper decision is a matter of general interest. No such claim could have been entertained in this District prior to the passage of the Act of 1884; although laws to secure mechanics' liens have been in operation here for a longer time perhaps than in other jurisdiction.

Mr. Sargent in his work on Mechanics' Liens, claims that the earliest legislation in this country or in England securing a lien to mechanics, was the Pennsylvania law of 1806. But the Maryland Act of 1791, Ch. 45, designed to apply to the future Federal City, in the Territory of Columbia, as it was then called, allowed a lien for work on houses in Washington to be performed under a written contract with the owner, by bricklayers, carpenters, joiners, or other workingmen, fifteen years before the Pennsylvania law. But that act only protected those who had made written contracts directly with the land-owner.

In 1833 Congress passed a law which was almost identical in terms with the Pennsylvania Acts of 1806 and 1808. But those acts were uniformly construed by the courts of that State as not embracing the case of a subcontractor; and the Act of 1833 could admit of no wider construction. Indeed it received a still narrower interpretation by the Supreme Court in the case of *Winder vs. Caldwell*, in 14 How.,

434. The act enumerated the classes of persons who should have the benefit of the lien ; and although in one part of the act the word " contractor " is mentioned, yet as this word did not appear in that enumeration, it was held that a *contractor* was excluded from its benefits.

Then came the Act of 1857, which constituted the whole of Chap. 20 of the Revised Statutes relating to the District of Columbia, excepting the last two sections, which are taken from the Act of 1870. Under neither of these acts had the subcontractor any lien. By the Act of 1870, the word " subcontractor " was introduced for the first time into our law ; but that act only gave to the subcontractor the right to claim from the owner, after due notice, the value of services rendered ; but gave no lien against the property.

The Act of 1884, Ch. 143, for the first time gave a lien to the subcontractor.

The first section of this act declares " that every building hereafter erected or repaired by the owner, or his agent, in the District of Columbia, and the lot or lots of ground of the owner upon which the same is being erected or repaired, shall be subject to a lien in favor of the contractor, subcontractor, materialman, journeyman and laborer, respectively, for the payment for work or materials contracted for or about the erection, construction or repairing of such building, and also for any engine, machinery, or other thing placed in said building or connected therewith, so as to be a fixture, etc. : *Provided* the person claiming the lien shall file the notice prescribed by the 2d section of the act: *And provided further*, that the lien shall not exceed or be enforced for a greater sum than the amount of the original contract for the erection or repair of said building or buildings."

The 12th section declares " that any person who shall furnish, at the request of the owner, or his agent, materials to do any work on, or labor in, filling up any lot, or in erecting or constructing any wharf thereon, &c., shall be entitled to enforce a lien therefor upon the lots or wharves."

And the 13th section provides that any mechanic or artisan who shall make, alter or repair any article of personal property, at the request of the owner, shall have a lien thereon for his just and reasonable charges, for his work done and materials furnished, etc.

The only persons protected by the last two sections are such as deal directly with the owner or his agent; of course no subcontractor not directly in privity with the owner could claim any benefit of their provisions.

If we are to construe this word "subcontractor" in the first section as including the first subcontractor under a subcontractor, which is the position held by Monroe & Co., there can be no legal reason why we must not go still further and include a *subcontractor under the subcontractor*; for such subcontractor in the second degree is still a "subcontractor," although a more remote one; and the same reasoning would give a similar lien to the subcontractor in the third, or still more remote degree.

The Act of 1870 placed the "subcontractor" in association with the journeyman, laborers and materialmen, as constituting the classes who were thereby authorized to maintain an action against the owner. The same enumeration of classes is adopted in the Act of 1884; and it would seem as though the law-giver had taken the Act of 1870 as his guide, and intended to include only the same classes of persons who had been comprehended in that act; while enlarging the privilege already given them by that act, so as to give them also a lien against the property of the owner; and we think Congress has by the Act of 1884 only enlarged the rights previously given by the Act of 1870, and has not added to the number of classes to be benefitted by the new law.

We must assume that Congress was aware of the course of the prior adjudications, which had consistently excluded the claims of any class of employees not distinctly included in the enumeration to the statute in favor of those who are found to be distinctly included.

The complainant refers to certain expressions used by this court in *Spalding vs. Dodge*, decided March 5, 1888, as sustaining the right of a subcontractor in the second degree to a lien under the Act of 1884. But no such question was before the court in that case, as the claimant was a subcontractor under the original contractor; and the language of the opinion bears no such meaning, and the court had no purpose of deciding the proposition here advanced by the complainants. The court there said:

"But we think it is not within the contemplation of the statute that there should be any privity of contract between the subcontractor, the materialman and laborer on the one hand and the owner of the property on the other. It is sufficient to give them a status to sue that there has been a contract by the owner with somebody to improve the property, and that the party claiming a lien should either have furnished materials under a contract *with the principal contractor*, or *be a subcontractor* for the doing of some of the work, or be simply a laborer employed either by the *contractor or subcontractor*. The purpose of the statute evidently is to put the contractor, the *subcontractor*, the materialman and the laborer upon an equality with reference to a lien upon the property, each having an equal right to claim and to enforce it, upon showing that he comes within the definition of the statute, either as a contractor, *subcontractor*, materialman, or laborer."

The counsel for Monroe & Co. were asked whether they had been able to find any reported case sustaining their contention, and they frankly responded in the negative. After the argument they referred us to the case of *Lumbard vs. Railroad Co.*, 64 Barbour, 609, as in point. But the court was there considering the provisions of a statute only applicable to the county of Onondaga, the language of which was broad enough to include the subcontractor in the second degree; and that decision is not an authority on the construction of any statute less broad than the act there under consideration.

There is, therefore, no authority, so far as we have been able to find, which could possibly justify us in adding to this statute a feature that the Legislature has declined to engraft upon it.

The argument *ab inconvenienti* cannot be invoked by a court to nullify the plain terms of a statute. Where distinct words are used, the only duty of the court is to obey them. But where the language is doubtful and a necessity for construction arises, the court may well consider whether the Legislature could have intended a construction that would be highly injurious to the public, rather than one beneficial or harmless. We can easily conceive of very injurious consequences if the construction of this act were carried to the extent it must reach if the complainants are correct in their contention. The contractor for houses may give a subcontract to parties who the owner might never have heard of, and who may never have seen the owner during the progress of the whole work. Yet such subcontractor would have a perfect right to sublet his subcontract; and that subcontractor in turn would have a right to enter into subsidiary contracts to obtain some of the material from one man, and some from another, who, in their turn, would have the right to sublet their subcontracts.

The subcontractor in the second or successive degrees might have obtained the clay or the fuel to burn the brick from new subcontractors; and the men who subcontracted to make the brick or to burn or handle them, might imitate their predecessors, and join in the interminable litigation that would result. The mere costs of the strife might prove ruinous to the owner of the property, who, in entire ignorance of these accruing claims might find his land overlaid by successive strata of liens, in favor of persons whose names he had never heard before. Such a construction would "add a new terror" to the existing risks of house-building, which ought not to be increased in this jurisdiction.

We cannot conceive that Congress with a supposed knowl-

edge of the previous legislation and decisions could have had the intention to engraft so hurtful a feature on our system; and being clearly of the opinion that such was not its intention, and that subcontractors of subcontractors under circumstances like the present are not entitled to hold a lien upon the owner's property, we shall sign a decree directing that the bill be dismissed.

THE DISTRICT OF COLUMBIA.

vs.

MICHAEL RUBERT.

After a trial in the Police Court and appeal had to the Criminal Court the defendant cannot, without consent or leave of court, withdraw his plea of not guilty to plead misnomer in abatement.

Criminal Docket. No. 16,994. Decided May 1, 1889.

The CHIEF JUSTICE and Justices JAMES and BRADLEY sitting.

MOTION in the Criminal Court for a new trial, certified to the General Term for a hearing in the first instance.

THE FACTS appear in the opinion.

Mr. H. E. DAVIS for District of Columbia.

Mr. E. M. HEWLETT for defendant:

The appeal taken in the Police Court, vacated the judgment, and the cause came for trial in the Criminal Court *de novo*, and any plea that could have been taken advantage of in the Police Court could have been taken advantage of in the Criminal Court. R. S. D. C., Sec. 773.

Mr. Justice BRADLEY delivered the opinion of the Court:

I have been requested to announce the decision of the court in this case. The case comes here to be heard in the first instance upon the certificate of the justice holding the Criminal Court, upon a motion in arrest of judgment and a motion for a new trial.

The case originated in the Police Court upon an information charging the defendant with keeping an unlicensed bar. He was arraigned on the 19th of January, 1888, and pleaded not guilty; he was tried the same day, adjudged guilty and was sentenced, and from the sentence he took an appeal to the Supreme Court of the District of Columbia, and in default of \$300 bail he was committed to jail. On

the 25th day of January he appeared in the Criminal Court with his surety, the court took his recognizance in the sum of \$300 to appear at that term and the subsequent terms of the Criminal Court, and he was thereupon released from custody. On the same day, upon his application to the justice holding the Criminal Court, his case was permitted to be docketed without the deposit of costs required by the rules of the court, and the order to that effect recites that it had been made to appear to the satisfaction of the court, by testimony in open court, that said Rubert was unable to make the required deposit. The name of the defendant given in the information was Michael Rubert. On the 31st of January his cause came on to be tried in the Criminal Court, and he then made application to the court for permission to file a plea of misnomer, claiming that his name was not Michael Rubert, as given in the information, but that his name was Michael Ruberto. His application was refused, and the trial proceeded, resulting in a conviction. Thereupon, on the 6th day of February, he filed a motion for a new trial, and also a motion in arrest of judgment. The grounds in support of the motion for a new trial are, first, because the verdict was contrary to law; and second, because the court refused to allow him to file a plea in abatement, as he had pleaded to the merits in the court below. The reasons given in support of the motion in arrest of judgment are, so far as the second reason is concerned, identical with the second reason in support of the other motion. The first reason in support of this motion is that there was no issue joined. The court has certified these two motions to this court to be heard in the first instance, for its advice and instruction: first, had the defendant the right to file such plea; second, was it error in the court to decline to receive or consider it; and, third, should the verdict of the jury be set aside for refusing the plea.

So far as the motion in arrest of judgment is concerned, it is apparent that there is nothing in the record upon which

to base it. The ground given that there was no joinder of issue is not substantiated at all by the record, even if that could be used as a basis for a motion in arrest of judgment. There was a plea of not guilty entered in the Police Court, and when the case came on for trial before the Criminal Court there was no application made to withdraw that plea, but the application to the Criminal Court was simply for leave to file the plea of misnomer.

With reference to the motion for a new trial, it will be readily seen that, in the order of things, after having pleaded to the merits it was too late to plead in abatement, and that without considering the question whether such a plea could be offered or received in the Criminal Court. This court has no difficulty over the question as to the right to file such a plea in the Criminal Court. Such a plea might be filed by consent, or under some circumstances it might be filed by the grace of the court, but there is no right in the defendant after his case had been tried in the Police Court and is before the Criminal Court upon an appeal, to withdraw his plea of not guilty and plead in abatement. So that there cannot possibly be any ground for error in the trial in the Criminal Court. This court, however, has no difficulty over the doctrine of waiver. There is no doubt that many rights of a defendant in a criminal prosecution may be waived either expressly or by implication. This defendant had his opportunity in the Police Court to plead in abatement. He was arraigned there under the name of Michael Rubert, and he pleaded not guilty. It was perfectly competent for him to have agreed to be tried either under the name of Michael Rubert, or under any other name, and if the circumstances of his pleading are such as to indicate an implied waiver, that may be just as absolute against him as if he had expressly waived his right. Not only did he plead not guilty in the Police Court and go to trial, and was convicted, sentenced, and appealed under that name, but on the 25th day of January, 1888, six days there-

after, he appeared in the Criminal Court with a surety, and his recognizance in the sum of \$300 was taken under that name. Not only that, but upon the same day he made an application to the justice holding the Criminal Court for leave to docket the case without the deposit for costs, and the court in its order recites that it was made to appear by testimony in open court that said Rubert was unable to pay the docket fee. It was then too late, having repeatedly waived his right to plead in abatement, to offer to file that plea when the case came on for trial in the Criminal Court.

It is claimed that this right is a right which the defendant has by virtue of Sec. 773 of the Revised Statutes of the District of Columbia, inasmuch as that section provides that the case shall be tried in the Supreme Court as though it "had originated therein." This section is as follows:

"Appeals from the Police Court shall be tried on the information filed in the court below, certified to the Supreme Court, by a jury in attendance thereat, as though the case had originated therein, and the judgment in the Supreme Court shall be final in the case."

The original act of Congress of July 17, 1870, Sec. 3, reads, "That prosecutions in said Police Court shall be by information under oath, without indictment by grand jury or trial by petit jury, but any party deeming himself aggrieved by the judgment of said court may appeal to the Criminal Court, held by a justice of the Supreme Court of the District of Columbia, and in such case the appeal shall be tried on the information filed in the court below, certified to said Criminal Court, by a jury in attendance thereat, as though the case had originated therein."

It would appear from the language of the original act, that by this section, it was not intended that a case, when appealed from the Police Court to the Criminal Court, should be tried in the Criminal Court as if there had been no trial in the Police Court, but that it should be tried in the Criminal

Court, with a jury, as if it had originated therein upon information. A slight change in the order of the words in this section would appear to indicate that appeals from the Police Court shall be tried on the information filed in the court below, certified up, by a jury in attendance thereat, as though the case had originated therein. The case having been tried in the Police Court without a jury, coming to the Criminal Court on appeal, it would seem the Legislature intended to indicate by positive language, that, upon a trial upon the appeal in the Criminal Court, the defendant should be entitled to the benefit of a trial by jury as if the case did not come there by appeal. In this case the court is of opinion that the defendant has clearly waived his right to plead in abatement.

Among several cases to like effect the court will refer to one which is found in 12 Allen, 539, the case of *Commonwealth vs. Thomas Darcey*. The case is identical in every particular apparently with the case now being disposed of. It appears that the defendant, being a common seller of spirituous and intoxicating liquor, was originally tried before a trial justice, by whom he was convicted upon a plea of not guilty. The defendant thereupon appealed to the Superior Court. When arraigned in the Superior Court, before Bingham, J., the defendant proposed to plead that his true name was Dorsey, and that he was called and known by no other name than Dorsey; but the judge refused to admit such plea. The defendant was then tried and convicted, and alleged exceptions. It was claimed in argument that the appeal opened all issues of fact which were open before the trial justice. Hoar, J., says:

"Misnomer can only be taken advantage of by a plea in abatement, and a plea of not guilty to a criminal charge is a waiver of any objection of misnomer. The appeal from the judgment of a trial justice opens the issues which were made by the defendant before him. But after a plea of not guilty, a plea of misnomer in abatement could not be made

before the trial justice ; and, we think, cannot be made at any subsequent stage of the case. If the defendant had pleaded in abatement before the justice, and judgment had been rendered against him upon the plea, his appeal would have re-instated him in all his rights of defense. But there is no reason why he should have a second opportunity to make a dilatory plea which he has expressly waived. He can have all the advantages resulting from an acquittal or conviction by proving, whenever it becomes material, that he is the person who was acquitted or convicted by the name to which he pleaded. And this he must do if he had been indicted and tried by his true name."

There is nothing in this case to commend it to the court, or to justify any stretching of the ordinary rule. The motion for a new trial and the motion in arrest of judgment must be each overruled, and the case remanded to the Criminal Court for sentence or such proceedings as the justice thereof may think proper.

EDWIN C. MANNING, ADMR.,

vs.

THE UNION TRANSFER COMPANY.

In an action of trespass, the court below instructed the jury as to the measure of damages in case the defendant was found guilty; the jury found the defendant not guilty. *Held*, that even if the court were wrong in its instruction as to the measure of damages, the verdict should not be disturbed inasmuch as the finding of not guilty showed that the consideration of the question of damages was manifestly never reached by the jury.

At Law. No. 26,759. Decided May 20, 1889.

Justices HAGNER, JAMES and MONTGOMERY sitting.

MOTION for a new trial on a bill of exceptions.

THE FACTS are stated in the opinion.

Mr. S. S. HENKLE for appellant.

Mr. H. E. DAVIS for appellee.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

The plaintiff was defeated below and comes here on a bill of exceptions. On the evening of March 4, 1885, his son, a young man aged twenty years, unmarried and childless, was run over and killed by a hansom cab. The plaintiff, being the father of the deceased, was duly appointed administrator of his estate and sued to recover damages for the injury which he alleged resulted in his son's death. 23 Stat. at L., 307.

The trial justice instructed the jury on the subject of damages, that "the recovery should be limited to the pecuniary value, if any, of the services of the deceased to his father between the date of his death and his majority, but that the damages would be at least nominal," and this instruction is alleged as the sole error. We do not feel called upon to declare whether we concur in or dissent from this

view of the law for the reason that this question (of damages) was manifestly never reached by the jury. The first question for their consideration was whether the defendant was guilty or not guilty. If guilty, they were instructed to award some, and at least nominal, damages. If not guilty of course no damages could be awarded. They returned a verdict of not guilty and it therefore became wholly immaterial whether the trial justice stated the rule of damages correctly or incorrectly. If he was wrong no injury resulted or could result to the plaintiff. Therefore, if error, it was not "a prejudicial error," and would not warrant a disturbance of the judgment below, which must be affirmed.

JOHN B. FAY

vs.

JAMES ANGLIM & CO.

Where the instructions of the court are not justified by the testimony as it appears in the bill of exceptions a new trial will be granted.

At Law. No. 28,970. Decided May 20, 1889.
Justices HAGNER, JAMES, and MONTGOMERY sitting.

MOTION by plaintiff for a new trial on a bill of exceptions.

THE FACTS appear in the opinion.

Mr. JAMES FULLERTON for plaintiff.

Mr. FRANKLIN H. MACKEY for defendants.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

The defendants come to this court alleging error in the charge of the trial justice. Mr. Fay has sued upon a \$100 check, payable to bearer, drawn May 30, 1884, by James Anglim & Co., a firm composed of the two defendants, upon "Middleton & Co., bankers," in this city. The declaration counts upon the check and the common counts in assumpsit are added.

On the trial the plaintiff testified that on the 24th day of May, 1884, he met the defendant, Mr. Lowdermilk, and requested him to cash a \$200 check, which he, the plaintiff, had with him, payable to his order, and drawn by some third party on a New York bank; that Mr. Lowdermilk replied that he did not have enough money, but upon being assured by the plaintiff that he "did not need more than fifty dollars that day and could wait for the balance," said he could arrange it for him. The plaintiff then and there indorsed the \$200 check and gave it to Mr. Lowdermilk, who deposited it in Middleton & Company's bank to the

credit of defendant's firm, and thereupon gave him (plaintiff) the firm check on the same bank for \$50. That plaintiff called on Mr. Lowdermilk three days later "and requested \$50 more on account of said check, which was accordingly given him." And that he again called on May 30, Decoration Day, and Mr. Lowdermilk gave him the check in suit, at the same time saying, "he did not know whether the \$200 check had been collected by the bank or not, * * * but supposed it was all right." That this day being a holiday and the bank closed, plaintiff next day went and presented his \$100 check, "and found that the bank had closed its doors, having made an assignment for the benefit of its creditors." That plaintiff kept no bank account of his own, and that defendants undertook what they did gratuitously and "as a matter of friendly accommodation."

The defendant, Lowdermilk, testified that Mr. Fay requested him to deposit the check in his, Lowdermilk's bank, and to "let him have fifty dollars on account until the money could be obtained on said check through Middleton & Company's bank." To which he, Lowdermilk, agreed, and at the same time gave plaintiff a \$50 check on the same bank; that the defendants took the \$200 check indorsed by the plaintiff, "and deposited it with said Middleton & Company for collection," to the credit of his firm; that on the 27th of May plaintiff called and asked if the \$200 check had been heard from, and upon being informed that Mr. Lowdermilk "did not know whether it been collected or not, but supposed it was all right," the plaintiff replied, "that he only needed fifty dollars on that day, and that much would suffice until the check was heard from; whereupon \$50 more was given plaintiff;" that defendants were not in the banking or discount business, and that "when the said bank of Middleton & Company failed, witness and his firm were both losers, having money on deposit there."

In all other material respects Mr. Lowdermilk's evidence substantially corroborated that of Mr. Fay. No other witness was sworn, and the bill of exceptions asserts that it contains "all the evidence offered." The court below instructed the jury that if satisfied from the evidence that the plaintiff deposited the \$200 check with the defendants to be collected for him; that they deposited it with Middleton & Co. in their (firm) name for their collection; that it was placed to their credit; that it was collected and that defendants suffered it to remain "to their own credit with Middleton & Co., and afterwards gave the \$100 check for the balance, which check was presented, dishonored, and defendants duly notified on the day of such dishonor, then the plaintiff was entitled to recover. To this instruction the defendants duly excepted.

It is not impossible that the undisputed facts as proven at the trial, or as they in fact existed, may have fully warranted this instruction. But the question for our determination is, whether assuming that all the evidence is stated in the bill of exceptions, the charge is or is not correct. No testimony was offered as to when the bank actually assigned or closed its doors, whether before or after the \$100 check was given, nor whether it was open at all on May 31, nor as to the condition of defendant's bank account at any time after they received and deposited the \$200 check, nor that they drew any checks upon Middleton & Co., except those given to Mr. Fay, on or after May 24, nor that they in any manner used or interfered with their credit after such deposit.

Nor is it shown that defendants were ever notified until suit of the dishonor of their check. On the other hand there is evidence tending to show that the defendants undertook what they did without charge and for plaintiff's accommodation. That Mr. Fay requested Mr. Lowdermilk to deposit the \$200 check in their (defendant's) bank "and let him have \$50 on account until the money could be ob-

tained on the check" through defendant's bank. That plaintiff knew where the check was deposited and offered no objection to it. That when the second \$50 was paid him plaintiff stated that the same would "suffice until the check was heard from." In other words the testimony of Mr. Lowdermilk tends to show that he simply undertook, at plaintiff's request, to gratuitously collect the \$200 check for him and in a way which he, plaintiff, suggested; that the collection was made through the agency to which both had agreed and the money was thereafter lost by failure of the agent and without the fault or negligence of the defendants, and for aught that appears in the record before the plaintiff called and got the \$100 check.

Upon the record, as we find it, we feel compelled to declare that the testimony did not justify the instruction that was given, and therefore the judgment must be reversed and a new trial ordered.

J. BEALL JOHNSON ET AL.

v/s.

THE DISTRICT OF COLUMBIA.

No appeal lies to the General Term from a decree or order merely respecting costs and expenses.

At Law. No. 26,208. Decided May 27, 1889.
Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from an order of the Court below refusing to re-tax costs.

Mr. J. J. JOHNSON for plaintiff.

Mr. A. G. RIDDLE for the District.

Mr. Justice HAGNER delivered the opinion of the Court:

This case comes here on an appeal from an order of Justice Merrick refusing to retax the costs. By Sec. 828 of the Revised Statutes it is declared that "if the declaration state a cause of action of which the court has jurisdiction, but the verdict finds the money payable by the defendant to the plaintiff at less than the lowest sum of which the court has jurisdiction, the plaintiff shall have judgment for the amount found due to him from the defendant, but without costs."

In this case a verdict was rendered in favor of the plaintiff for 1 cent damages, and the clerk entered the judgment without costs, according to the provisions of the section quoted; and a motion was made below by the plaintiff to correct the judgment so as to allow costs, upon the ground that the section was only applicable to actions on contract, and did not include actions *quare clausum fregit*, which could not be maintained by a justice of the peace.

The trial justice overruled the motion, and held this case

was embraced by the statute. A motion is made here by the defendant to dismiss the appeal. This court has recently decided in the case of Fraser against the District of Columbia, on the authority of *Canter vs. The American and Ocean Insurance Companies*, 3 Peters, 307, that no appeal lies from a decree or order merely respecting costs and expenses.

The appeal, therefore, is dismissed.

THE DISTRICT OF COLUMBIA.

vs.

JOHN LYON.

1. In a criminal case tried on information in the Police Court, where an appeal is taken to the Criminal Court, and the defendant is acquitted, there is no provision of law by which he may have judgment for costs and witness fees.
2. The hardship of such cases may be materially reduced by the application of Section 839, Revised Statutes District of Columbia, which provides that the judge trying the case may allow a necessary number of witnesses for defendant, the fees and costs of service to be paid in the same manner as Government witnesses are paid.
3. The defendant is entitled to a return of a deposit made under Rule 128, regulating appeals from the Police Court.

Criminal Docket. Nos. 16,833 and 16,848. Decided June 3, 1889.
Justices HAGNER, JAMES and MONTGOMERY sitting.

MOTION for judgment for costs heard in the General Term in the first instance.

THE FACTS are stated in the opinion.

Mr. GUION MILLER for the motion.

Mr. A. G. RIDDLE *contra*.

Mr. Justice HAGNER delivered the opinion of the Court :

This case is here on certificate of the justice holding the Criminal Court. It is a prosecution under the Cruelty to Animals ordinance of the first Legislative Assembly, chapter 106 ; one of the sections of which punishes the offense charged: Working mules when unfit for labor.

The 2d section of the act provides that the offender "shall for every such offense be punished by imprisonment in jail not exceeding one year or by fine not exceeding \$250 or by both fine and imprisonment." In this case, Lyon was tried on an information filed in the Police Court, found guilty and a fine was imposed. He appealed to the Criminal Court. This he had a right to do under the Revised

Statutes of the District, Section 773 of which prescribes that such appeal shall be tried on the information filed in the court below "as though the case had originated therein." The jury in the Criminal Court rendered a verdict of acquittal; and the defendant thereupon moved the court that judgment should be rendered in his favor against the District of Columbia for the amount of the costs charged against him, part of which, consisting of the fees of his own witnesses, he had actually paid out of his own pocket. The question is one of importance, as its determination will affect a considerable number of cases, and it involves an apparent hardship to which many who have been declared innocent by the verdict of a jury are subjected.

It is insisted the rule should prevail in this case which applies to civil actions, where the defendant is allowed costs if he prevails, in all cases where the plaintiff would have received such an allowance if he had recovered a verdict, or where the plaintiff would have recovered damages.

It is admitted the ruling desired is not supported by the practice of the court; nevertheless, if it is a proper one it should prevail.

It is familiar law that costs were not recoverable by either party at common law, and that it is necessary to show statutory provisions authorizing them before they can be allowed. They were first allowed to plaintiffs by the Statute of Gloucester (6 Edward I) in real actions, and subsequent statutes extended the allowance to other actions. The first statute allowing costs to defendants is 23 Henry VIII, which declared that in certain enumerated actions, when the plaintiff was non-suited, the defendant should have his costs; and by the statute of 4 James I, the right was extended to other designated actions, including certain penal actions. But neither of these statutes included prosecutions in any form at the instance of the Government; as well because the Government was not named as because of its position as sovereign suing in its own courts. This was

always the construction of the acts in England; and it was equally well settled in this country. This point came up at an early day in the Supreme Court in the case of *United States vs. Hooe et al.*, 3 Cranch., 73. There the United States had filed a bill in equity to subject certain property to a claim of the Government. The court below dismissed the bill as to Hooe and some others, with costs against the United States, and on appeal the decree was affirmed by the Supreme Court. Afterwards the attention of the court was called to the provision in the decree below awarding costs. The question was then one of first impression in that court. The next day the Chief Justice directed the word "with costs," to be struck out, as there appeared to have been some cause in certain cases for the prosecution; but he observed that the court did not mean to be understood as deciding whether they could award costs against the United States; but left it entirely open for future discussion. Twelve years afterwards in the case of the *United States vs. Barber*, 2 Wheat., 395, the court finally disposed of the question forever in these words by the Chief Justice: "The United States never *pay costs*." Costs are declared to be in the nature of penalties, and statutes imposing them receive strict construction. There is no statute of the United States authorizing the enlargement of the English statute so as to include a case like the present. An act was passed in Maryland in 1781, declaring that in all prosecutions where the defendant is acquitted he shall not be required to pay costs, but that they should be paid by the State. That statute came very near being a law of the District of Columbia, but it expired in 1799, shortly before the cession of the District, and although renewed in Maryland in 1809 as a permanent statute it never was in force here. It would seem to be, upon the whole, a just enactment, and it should be the law here. If the defendant is convicted on such a prosecution, he must pay an attorney's fee, to be taxed in favor of the District Attorney, besides all the costs as a part

of the penalty, in addition to the fine imposed. If he is acquitted it seems rather a hardship that he finds himself relieved only of the fine and the costs of the District. But this is a prosecution, criminal in its nature, for the offender may be imprisoned in jail for one year, besides paying a considerable fine; and, in this particular, it must be governed by the law affecting criminal prosecutions. We have found only one case, *Corporation of Washington vs. Ward*, 4 Cranch C. C., that seems at all to support the claim of the defendant. There an ordinance of the corporation of Washington declared that whoever should carry on a brick-kiln without a license should incur a penalty of \$10 for every week the business was so continued. The defendant was brought before a justice of the peace for violation of that ordinance, charged with five separate offenses. On appeal to the Circuit Court the judgments were reversed, the Chief Justice delivering a very careful opinion on the subject. Thereupon Ward's counsel moved for a judgment against the corporation for costs in favor of the defendant. That motion was argued very carefully and held over for several terms from 1831 to 1835, at which term the court ordered the reversal should be with costs against the District. Judge Cranch in his head-note to the report of the case (no opinion having been delivered), says: "It is in the discretion of the court to allow or refuse costs on the reversal of a judgment of a justice of the peace," placing the practice upon the discretion of the court.

But that case differed in important particulars from this in that it was a mere suit for a penalty.

The language of the ordinance in that case was: "Any person who shall erect or use a brick-kiln in the City of Washington, without first obtaining a license from the mayor, shall be subject to a *penalty* of ten dollars a week, &c." Again, appeals from justices of the peace are to be determined on appeal according to the law "and the equity and right of the matter," and this provision might justify the

appellate court in exercising a discretion, as equity courts may do in respect to the imposition of costs. That case can not be taken as an authority on the point before us.

But the power of Section 839 of our Revised Statutes may be invoked in such cases as this, and its application would reduce the hardship of this defendant's predicament very materially.

That section provides that "in all criminal trials the judge trying the case may allow such number of witnesses on behalf of the defendant as may appear necessary, the fees thereof, with the costs of service, *to be paid in the same manner as Government witnesses are paid.*"

There was another point alluded to in the argument. We have a proper and reasonable rule, No. 128, which regulates appeals from the Police Court. If some such provision were not in force, nearly every case would be appealed from the Police Court for mere delay.

It requires the defendant to make a deposit of \$5 for costs before the clerk shall docket the appeal. The defendant deposited \$5 in each of these cases. He has been acquitted, and he wants a return of this money. We are clearly of opinion that no right exists to retain it after the defendant is acquitted. It would be almost an outrage to do so.

The motion of the defendant certified here is overruled.

THOMAS E. SMITHSON

vs.

MARY JANE SMITHSON.

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1. On a petition for divorce, filed by the husband, on the ground of willful desertion and abandonment, the petition will be dismissed where it appears that the wife left with the consent of the husband.
 2. So, even where it appears that the departure of the wife was caused by mistaking the language of the husband as a consent to the departure, yet the bill will be dismissed if it appears that no effort was made to rectify the wife's error by inviting her to return.

In Equity. No. 10,772. Decided June 10, 1889.

Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from a decree of the Special Term dismissing a petition for divorce.

Mr. S. T. THOMAS for petitioner.

Mr. FRED. W. JONES for defendant.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

In this case the complainant filed his petition for divorce on the 17th day of September, 1887, charging the defendant with willful desertion and abandonment of the complainant for the full and uninterrupted space of two years. The bill was dismissed below and the complainant appealed.

It appears by the petition that the parties were married in 1858, lived together for about twenty-three years, and have one son aged now about thirty. It is quite evident that they were not living happily together for several years before the alleged desertion. Finally, early in October, 1881, the wife left the house, taking with her a large share of the household furniture, and in company with the son went to live elsewhere, and ever since the husband and wife have lived apart. The undisputed evidence shows that for some months immediately preceding the time that the wife left home she had been threatening to leave, or telling her

husband that she intended to do so, and he never objected. On the contrary, whenever she said anything on the subject, he would tell her, in substance, to go as soon as she pleased; that they last talked on this subject some three or four days before she went, when she said, in substance, to him that she could not stand his conduct any longer, that she was going to leave, and asked him if he would allow her to take the furniture, a certain portion of it, and he said, "Yes; when you leave take it all." This is testified to by the son, and is not only undisputed, but seems to be corroborated by the whole case, and there seems to be no doubt about this. It thus seems to be clearly established that the wife left the husband and he has charged her with willful desertion and abandonment. If she left her home with her husband's consent, then she is not liable to the charge of willful desertion within the meaning of the statute. 1 Bishop, Mar. and Div., Sec. 783.

Complainant's counsel represents that the husband evidently did not mean what he said, and did not expect her to leave, but he did tell her to go, and she at least understood him to consent to and wish it. She did go, and he has never advised her of her misapprehension (if she did misapprehend him), nor invite her to return, as was his clear duty, if he repented and desired her return, or if he was misunderstood. *Id.*, Sec. 786.

These facts, together with the further fact that he has never requested the return of the furniture, afford very strong reasons for concluding that he wanted to be rid of her. It is not proven or claimed that he ever wished or invited her to return, but after living separate and apart for six years he has filed his petition for divorce. The question is, had the defendant, when this suit was begun, been guilty of two years willful desertion and abandonment against the party complaining. We think not. We therefore do not find it necessary to review or pass upon the other facts discussed by counsel.

The decree must be affirmed with costs.

BRADSTREET

vs.

BRADSTREET.

1. The proof of residence in this case reviewed and held to meet the statutory requirement that the party applying for divorce shall have "resided within the District for two years next preceding the application."
2. If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period.
3. A residence out of the domicile of origin repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it.
4. Where a person lives is taken *prima facie* to be his domicile until other facts establish the contrary.
5. On the evidence in this case, *held*, that the defendant was domiciled in Washington.

In Equity. No. 10,886. Decided June 10, 1889.

The CHIEF JUSTICE and Justices HAGNER, JAMES, MONTGOMERY, and BRADLEY, sitting.

PETITION for divorce. Hearing in General Term in the first instance.

THE FACTS are stated in the opinion.

Mr. HENRY WISE GARNETT for complainant: •

Where a person lives is taken, *prima facie*, to be his domicile until other facts establish the contrary. *Ennis vs. Smith*, 14 How., 423.

A person's residing in a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence. Lord Thurlow in *Bruce vs. Bruce*, 2 Bos. & P., 229 (note); Lord Loughborough in *Bempde vs. Johnstone*, 3 Ves. Jr., 198.

Prima facie he is domiciled where he is resident. *Stanley vs. Bernes*, 3 Hagg. Eccl., 373.

Lapse of time.

The respondent has resided *sixteen* years in the District of

Columbia. Residence, if long continued, is of great weight in determining the question of *animus manendi*.

"Of the principles that can be laid down generally, I may venture to hold that *time* is the grand ingredient in constituting domicile. * * * Time is the great ingredient in this matter. Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute domicile." Lord Stowell in *The Harmony*, 2 C. Rob. Ad., 322.

"If a man goes to another country and continues to reside there for a considerable period, as in this case, for ten years, without saying that a residence of ten years is necessary, or that ten years is the period sufficient, still the fact of his residing there for ten years is a *very strong indication* of his intention to establish his home and his domicile in that place." Lord Kindersley in *Cockrell vs. Cockrell*, 2 Jur. (N. S.), 727.

"As to domicile, it is undoubtedly true that length of time, connected with other circumstances, may go very far to constitute a domicile. 'Time,' says Sir William Scott, 'is the grand ingredient in constituting domicile.' I think that hardly enough is attributed to its effects. *In most cases it is unavoidably conclusive.*" Story, J., in *The Anna Green*, 1 Gall., 274.

Residence in one place for a number of years is a violent and continuing proof of the *animus manendi*, and it is incumbent on the party to repel this. *Elbers vs. Company*, 16 John., 128; 1 Wall. Jr., 264.

In *Attorney General vs. Kent*, 1 Hurl. & Colt, 12, it was held that lapse of time in a place constituted domicile there *in spite of declarations of intent to return to original domicile*.

An important element in determining the domicile of the head of the family is the residence of wife and family. This circumstance has been frequently referred to as important, *if not controlling*. 3 Wait's Act. and Def., Domicile, 635, quoting many cases.

For the principle that marriage in a country to a woman domiciled there is evidence as to domicile of husband, if he continues to reside in that country, see the decision of Lord Kindersley, who held that an Englishman's marriage in India and his continued residence there was strong evidence that he was domiciled there. *Cockrell vs. Cockrell*, 2 Jur. (N. S.), 727.

A mere floating intention to return to a domicile abandoned in fact cannot preserve such domicile.

"If a person has actually removed to another place with an intention of remaining there for an indefinite time and as a place of fixed present domicile, it is to be deemed his place of domicile, *notwithstanding he may entertain a floating intention to return at some future period.*" Story, Conflict of Laws, Sec. 46.

"If a person leaves this State and removes to another *with an intention of remaining there for an indefinite time* and as a place of fixed present domicile, it becomes his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." *Ringgold vs. Bailey*, 5 Md., 186.

A clerk of a congressional committee "living in Washington as a place of present residence, *though he had an intention of retaining his domicile in and returning to Minnesota at some indefinite period*, could not be said to retain a dwelling-place in Minnesota, and his domicile would not be there.

"A solemn declaration of intention not to renounce domicile held not to prevail:

"Probably he wished for two domiciles; but, in spite of a lurking desire to return to E, his acts show an intention to live and die in H, *and that is not affected by the declaration.*" *In re Steer*, 3 H., & N., *597.

Even the oath of a person whose domicile is in question, as to his intention to change his domicile, is not conclusive. *Wilson vs. Wilson*, 2 Prob. & Div., 435.

Definition of domicile.

"That place must be adjudged to be the domicile which bears, most of all, the characteristics of 'home.'" Jacobs on Domicile, Sec. 423.

Domicile is a place where a man has established a home for himself and family. *Thayer vs. Boston*, 124 Mass., 132.

"There is no doubt that every person has his domicile in that place which he makes his family residence and principal place of business; from which he is not about to depart unless some business requires." Story's Translation of the Roman Code.

"Domicile is a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." President Rush in the leading American case of *Guier vs. O'Daniel*, 1 Binney, 349; *Phillimore in Lord vs. Colvin*, 4 Drew, 366.

"A man's domicile is his home, where he establishes his household and surrounds himself with the apparatus and comforts of life." *Tanner vs. King*, 11 La. R., 175; and see *Dennis vs. State*, 17 Fla., 389-401.

"Voting and paying taxes do not constitute a domicile, for domicile, being a question of general law, cannot depend on the municipal regulations of any State or nation." *Guier vs. O'Daniel*, 1 Binney, 349 (note).

In a divorce case where the respondent was a Government clerk in Washington it was held, although he claimed to be domiciled in Pennsylvania and *voted in that State*, that the Supreme Court of the District of Columbia had full jurisdiction.

"The circumstance that he was permitted to vote in Pennsylvania is not one to which we attach much importance on a question relating to the domestic relations." *Cartter, J., in Strait vs. Strait*, 3 Mac Arthur, 418.

"It will not do to say that one shall have of a community all that he can get out of the community; and, on the other hand, shall not return to the community some corresponding obligation"

of citizenship." Merrick, J., in *U. S. vs. Nardello*, 4 Mackey, 513, 514.

"Where the cause of divorce has occurred within the District, there is jurisdiction." *Smith vs. Smith*, 4 Mackey, 256.

MR. FRANK W. HACKETT for defendant:

1. The defendant's domicile is Royalton, Vt. The complainant, in June, 1886, abandoned Washington, and went to her native place, Detroit, Mich., thereby acquiring a Michigan domicile. At her marriage complainant acquired the domicile of her husband, namely, Vermont. On leaving Saratoga Springs, in August, 1887, complainant was domiciled in Vermont, and she has never since been in Washington.

2. To entertain jurisdiction the court must be satisfied that at the date of the filing of the bill (1) Mrs. Bradstreet had a domicile in this District; or (2) in the event that Mr. Bradstreet's domicile was elsewhere his wife had acquired, for the purpose of obtaining a divorce, a domicile here. Neither of these propositions are proved.

3. The certificate of marriage, signed by both parties August 6, 1886, gives as Mr. Bradstreet's residence, "Royalton, Vt." Mrs. Bradstreet therein alleges her residence to be "Detroit, Mich."

The defendant is only temporarily in Washington. A clerk of a legislative committee is less distinctly "located" in this District than are clerks of the Executive Departments. The latter class do not lose their domicile by coming here. *Atherton vs. Parker*, 8 N. H., 180; *Hannan vs. Grizzard*, 89 N. C., 116.

In *Carpenter vs. Carpenter*, 30 Kansas, 717, the point came directly in issue whether the plaintiff was a resident of N. County, within the meaning of the code providing that the plaintiff in an action of divorce must have been an actual resident in good faith of the county at the time of filing. Plaintiff lived at Leavenworth (not in N. County)

for five years as collector of internal revenue, going to N. County to vote, and keeping there a sleeping apartment and his law library. He married in Pennsylvania, brought his wife to Leavenworth, and kept house there. It does not appear that she ever went to N. County. *Held*, that he was an actual resident of N. County. See, also, *Hayes vs. Hayes*, 74 Ill., 312, where it was held that as regards distribution of personal property a domicile in Illinois is not lost by the party residing in Iowa, owing to domestic troubles, and by his voting there (Iowa's laws authorizing one to vote on a residence of six months) or by his purchasing a house and lot there on speculation. *Tyler vs. Murray*, 57 Md., 418; *Gittings vs. Ockermc*, 35 Md., 169.

The proof shows incontestably that defendant is a *bona fide* resident of Royalton, Vermont, his native town, where he has voted and always remained a voter. He has no business interest in this District, no money invested here in real estate or otherwise. He was not in the habit of staying here after his active work at the Capitol ceased. He came here from Vermont solely to act as clerk of a committee, a temporary office that he might be obliged to vacate at a moment's notice. His home is in Vermont, and while traveling he registered his name and that of his wife as of "Royalton, Vermont." He has effects at his father's house in Royalton, and a room kept there as specially his own. He accompanies the Vermont Senator to that State on the adjournment of the Senate. He is in no sense domiciled in this District.

"Residence" in divorce means "permanent abode," or domicile. *Jacobs on Domicile*, Sec. 76; *Ross vs. Ross*, 103 Mass., 575; *Bishop on Mar. & Div.*, Sec. 124.

The chairman of the committee testifies that he thinks Mr. Bradstreet's stay "is precisely like my stay here in my official capacity as a Senator, and that we are both citizens and residents of Vermont."

4. The plaintiff left Washington before her marriage to

defendant, and returned to her domicile of origin, Michigan. *Re Walker*, 1 Lowell, 237. Thence she wrote to defendant: "It seems now that I want to stay right here as long as I live. I never shall return." She was married here in August, 1886, as of Michigan. After deserting the defendant at Saratoga Springs, she has never visited Washington, but has sent here and had her furniture in part sold, the rest sent to her home in Michigan.

It is not necessary to deny the proposition that for the purposes of divorce a wife may obtain a domicile in this District while her husband has lived and continues to live elsewhere. The facts here show that plaintiff has not obtained such a domicile, nor has she ever taken steps thereto.

Mr. Bradstreet's domicile being in Vermont, this court has no jurisdiction of the bill, because the plaintiff had not resided within the District for two years next preceding the date of her application. Section 740 Revised Statutes provides that "No divorce shall be granted for any cause which shall have occurred out of the District, unless the party applying for the same shall have resided within the District for two years next preceding the application."

The bill alleges cruelties committed in Washington in December, 1886, and proceeds to show that the parties lived here as man and wife, until June, 1887, when they left Washington together for a summer trip to New Hampshire, etc.

The cruelties alleged to have been committed six months before they left the District, her bill on its face shows were condoned. The cause, therefore, for which divorce is now asked is certain misconduct alleged to have taken place outside the District, viz., in New Hampshire.

That a cause of divorce for cruelty once condoned may be revived by subsequent cruel treatment we admit, but we submit that it is not revived for any other purpose than as evidence that may be urged to satisfy the court in corroboration of a *present* cause, that the parties ought no longer to

live together. The condonation differs from that in cases of adultery, the effect of the injury being entirely dissimilar. The language of the statute is: "No divorce shall be granted for *any* cause which shall have occurred out of the District, unless," &c. If it be necessary to prove acts of cruelty committed out of the District in order to sustain this bill, then the wholesome restriction of the statute applies. The cruelty here charged must endanger life or health. It is not sufficient that there be a reasonable apprehension, to the satisfaction of the court, of bodily harm. This latter condition of affairs warrants a divorce from bed and board only. The real *cause* asserted in the bill is cruelty inflicted in New Hampshire.

The statute being designed for *bona fide* residents, and not for the benefit of outsiders, Mrs. Bradstreet cannot be regarded as having resided here for two years preceding the filing of her bill. Her resigning her office and going to her old home in Michigan, and writing thence that she should never return, brought to an end any domicile she may have previously had in Washington. This result accords with her own act in signing afterward her marriage certificate as a resident of Detroit, Michigan. The attempt of her daughter (whose testimony is involved in contradictions) to overcome the effects of this letter is useless. The letter, written just after she had left Washington, and had gone back to her domicile of origin, is not easily set aside by present protestations that her intentions were entirely different from what she at that time announced them to be.

A non-resident plaintiff (whether husband or wife) cannot invoke the jurisdiction of this court in divorce proceedings. So far as the opinion in *Smith vs. Smith*, 4 Mackey, 255, would appear to depart from the well-settled principles in this regard, it ought to be made the subject, upon proper occasion, of careful review.

Mr. Justice BRADLEY delivered the opinion of the Court: This is a proceeding for divorce. The petition was filed

October 25, 1887. The petitioner, Sarah Bradstreet, alleges in her petition that she was married to the defendant, George P. Bradstreet, in the District of Columbia, the 6th day of August, 1886; that she is temporarily stopping in the city of Detroit, State of Michigan; that she had resided in the District of Columbia for more than ten years prior to filing her petition, and that the defendant is also a resident of said District of Columbia. Her prayers for relief are based upon several alleged acts of cruelty on the part of the defendant, which are set forth in the petition, some of which are claimed to have occurred in the District of Columbia, and the last of which are alleged to have occurred outside of this District, some time in the summer of 1887.

The defendant was served with process, and on November 12, 1887, he filed his plea in bar, alleging that petitioner was not a resident of the District of Columbia at the time of filing her petition; that she had not resided therein for two years next preceding her application; that before her marriage with defendant she was a resident of, and domiciled in, the State of Michigan; that she deserted the defendant and went to the State of Michigan, where she resided at the date of filing her petition; and that defendant is not, and never has been, a resident of the District of Columbia, but has always been, and still is, a resident of Royalton, Vt., which is his domicile.

Issue being joined upon this plea, evidence was taken in behalf of both parties, and the cause having been set down for hearing, it has been certified to this court to be heard in the first instance.

From the testimony it appears that at the time of her marriage to the defendant the petitioner was a widow; that she came to the District of Columbia with her first husband, H. H. Cushing, and their children, and commenced housekeeping with him here in the month of May, 1868; that she continued to reside here with him until his death; that in 1872, after his death, she obtained a position in the

Post-Office Department, and continued as a clerk in said Department until June 28, 1886, when she resigned her position or was removed by the Postmaster-General, when she went to Michigan with her daughters; that during all this time she kept house and resided (with her children, two daughters and a son,) in this District; that when she went to Michigan in June, 1886, she left her house in this city open and in charge of servants; that she left Michigan and returned to Washington, and was married to the defendant, August 6, 1886; that she returned to Washington for the purpose of looking after her house, and to decide whether to accept another Government position, of which she then had the promise, or to marry the defendant; that after her marriage to defendant, he rented a house, No. 2017 Q street N. W., in this city, where she lived with him until the summer of 1887, when she went away with him for a summer trip, during which, on account of grief at her daughter's death, and because of defendant's alleged bad treatment, in the month of August, she went to visit her brother in Detroit; that she intended to return to this District, but, upon the advice of her brother, she remained in Detroit pending the divorce proceedings, her petition for divorce being sworn to in that city, and forwarded from there to this jurisdiction to be filed.

It is beyond dispute that the petitioner was a *bona fide* resident of the District of Columbia from 1868 until she resigned her office in June, 1886. It is claimed, however, that Michigan was her domicile of origin, and that when she returned there in June, 1886, she wrote to the defendant a letter, which, in stating that their former relations were now severed and entirely at an end, also uses the expression "I never shall return," and that inasmuch as the domicile of origin reverts easily, this declaration coupled with actual presence in that State, effected the change of domicile. But the evidence shows that she had the promise of another office in Washington; that she had left her house

here open and in charge of servants, and that she fully intended to return, and that statement considered in its connection, and with the circumstances surrounding it, appears rather to be a declaration that she would never return to her former relations with the defendant.

It is also claimed that the petitioner was not a resident of this District at the time of her application, inasmuch as she deserted the defendant at Saratoga in August, 1887, and went to Michigan to permanently remain. This claim is not sustained by the evidence, which shows that she is temporarily visiting her brother in that State, and that she is abiding with him pending this proceeding and intends to return to this District upon its termination.

Unless, therefore, the law requires something more than actual *bona fide* residence in this District of the party complaining, in order to maintain a suit for divorce, and unless the defendant, at the time of the marriage, was domiciled in Vermont, and was there domiciled at the time of this application, and such domicile drew to it that of the petitioner, so that she was no longer a resident of this District in the sense of the law from the time of her marriage to defendant, the requirement that the party applying has "resided within the District for two years next preceding the application," is fully satisfied by the proof in this case.

Was the defendant domiciled in Vermont? Vermont was his domicile of origin, but at the time of marriage he had not resided in that State for thirteen years. He had only visited his old home for a short stay in the summer. Had spent a part of his summers in travelling, and the remainder of the year he had resided in this District. This residence here was not for any definite, limited stay, but for ten years defendant had been clerk to the Judiciary Committee of the Senate, intending and expecting to remain here as long as that employment lasted. During this time he had boarded with the petitioner; had furnished a room in her house, and had removed furniture from Vermont to

Washington for that purpose. He had no home in Vermont in the proper sense of the word. His father was domiciled in that State, and the defendant was accorded the privilege of stopping at his father's house when visiting Royalton in consideration of the payment of board. He had not voted or paid taxes in that State for several years, but whether he had preserved or lost his political rights is not considered material. He was married here. He rented and furnished a house where he resided with petitioner and her daughters, and the evidence discloses efforts on his part to purchase that house, and declarations that if he could purchase he would spend the summers here.

"If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period." Story Conf. Laws, Sec. 46.

"But what amount of proof is necessary to change a domicile of origin into a *prima facie* domicile of choice? It is residence elsewhere or where a person lives out of the domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicile until other facts establish the contrary." *Ennis vs. Smith*, 14 How., 422.

In *Ringgold vs. Bailey*, 5 Md., 186, the court says upon this subject: "The party's purpose to remain need not be fixed and unalterable. If it becomes a place of fixed present domicile it will be sufficient to fix a residence, and although there may be a floating intention to return to his former place of abode at some future period, still these circumstances will not defeat the newly acquired residence or the rights and obligations which attach to it."

In *Mooar vs. Harvey*, 128 Mass., 219, it appeared that defendant enlisted in the army, and in February, 1864, he

was detailed as bookkeeper in the Surgeon-General's office in Washington. In 1869 he was appointed a clerk in the Treasury Department at Washington, which office he held at the time of suit; that since February, 1864, he had lived in Washington. *Held*, that although the defendant was in military service, he could change his domicile to any place he saw fit. "The jury would be justified in finding that since 1864 he had actually lived in Washington with short occasional absences. This is one essential element of domicile in Washington. The remaining element is the intent with which he lived there * * * he lived in Washington, and all the outward *indicia* which usually determines the domicile of a person appointed to that place as the place where he resided and had his home. The evidence tended to show that he had not paid taxes nor voted in Lawrence since 1862. This failure to perform the duties and avail himself of the privileges of a citizen is a significant fact pointing to a change of domicile."

The evidence shows that at the time of filing the petition in this proceeding, the defendant had lived out of his domicile of origin for thirteen years, and that during that time he had resided in Washington. This was *prima facie* the domicile of choice, and imposed upon him the burden, which he also assumed by his plea, of proving that he had retained his Vermont domicile of origin. This burden has been assumed to be lifted by the inference sought to be drawn from the alleged temporary character of the defendant's employment, and his presence in the District of Columbia, under such employment, has been likened to that of a United States Senator, who may be temporarily located here representing the interests of his State. It is apparent, however, that the employment, although subject to termination at any time by the will of the Judiciary Committee, was not of a mere temporary nature, but was for an indefinite time; that the duties of such employment required the presence of the defendant in Washington during the greater portion of

the year. Unlike a Senator he is pursuing here his own business, seeking his own interests, and representing himself *exclusively*. His acquisition of a new domicile here is not only not inconsistent with his employment, occupation, and interests, but is thoroughly consistent with them, and the legitimate conclusion from the whole evidence of his conduct and declarations is that this District was and is his domicile of choice.

If, therefore, in Sec. 740, R. S. D. C., the word "resided" means "domiciled," we find that the petitioner and defendant were here domiciled at the time of their marriage, and that this was their domicile at the time of making this application.

The result of this conclusion is, we overrule the plea to the jurisdiction and remand the case to the Special Term.

JAMES E. YOUNG

vs.

CECELIA F. YOUNG.

On a creditor's bill praying the sale of decedent's real estate a decree was passed first assigning to the widow a portion of the property which she had agreed to accept as her dower and directing a sale of the remainder. At the sale the property brought a much larger price than had been anticipated by the parties, whereupon the widow petitioned for a re-assignment of her dower alleging that the first admeasurement had been accepted by her under misapprehension as to the real value of the estate. *Held*, on demurer, that the petitioner was entitled to a re-assignment.

In Equity. No. 10,789. Decided June 12, 1889.
Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from a decree dismissing the petition of a widow for re-assignment of dower.

THE FACTS are sufficiently stated in the opinion.

Messrs. EDWARDS & BARNARD for the petitioner:

The pleadings disclose, and it is conceded, that it was originally the intention of all parties that the widow should receive as her dower one-third in value of the real estate left by her husband, and that all parties were mistaken as to the value of the property, and therefore that the assignment was made on a wrong basis. A mistake thus arising it would seem to be the duty of the court to correct it and not allow one unnatural brother of her husband to deprive the widow of nearly one-third of what she is entitled to under the law.

Under the testamentary system widows are favored suitors in courts of justice.

A widow is not even barred of her legal rights by a devise from her husband, whether she shall or shall not renounce the will, in the manner provided, if nothing in

effect shall pass to her by such devise, it being (says the statute) "consonant to justice that a widow accepting, or abiding by a devise in lieu of her legal right shall be considered a *purchaser with a fair consideration*." Act of 1798, Ch. 101, Subch. 13, Sec. 5.

That she was receiving one-third in value of the whole of the real estate left by her husband, was the only consideration for her consent that the other property should be sold free of her dower; being mistaken in this, she was not a purchaser for full value, and this being a failure of consideration so gross and inequitable, a court of conscience having jurisdiction over the parties and of the proceeds of sale can, and should, do complete justice to all.

"Mistake in facts will always be remedied by the courts as far as can be done consistently with right and justice." *Carpenter vs. Jones*, 44 Md., 631.

Mr. W. WILLOUGHBY *contra*:

The petition is in the nature of a bill of review of a decree, which was passed by consent. The substantial ground alleged is that the appellant erred in judgment. It requires a much stronger case to set aside a decree than it would to set aside a contract.

A bill of review does not lie to set aside a consent decree. *Thompson vs. Maxwell*, 95 U. S., 397; 20 Am. Dec., 163; 101 Mass., 548; 2 Dan. Chan. Pr., 1629.

"Where parties act upon their own judgment in matters mutually open to them, equity will not relieve, although there has been a great mistake in the exercise of their judgment." 1 Story Eq. Jurisp., Sec. 149.

"A court will not interfere if there has been good faith." *Id.*, Sec. 150.

Mr. Justice HAGNER delivered the opinion of the Court:

In September, 1887, James E. Young filed his bill as creditor and also as one of the heirs at law of his brother, Robert W. Young, alleging the death of the latter, intestate

and childless, leaving his widow, Cecelia, and four brothers and one sister, all adults, his sole heirs at law; that the deceased died seized of several parcels of land in this city described in the bill, and indebted to the complainant for borrowed money; that letters of administration had been committed to his widow; that his personal estate was insufficient for the payment of his debts; and that it was necessary the real estate, or a part thereof, should be sold for the payment of the claim of the complainant and of the other charges against his estate.

He charged that the widow, as he was informed, desired her dower in the real estate should be assigned and set apart to her by commissioners appointed by the court, and that the real estate remaining after the assignment of her dower and the payment of the debts was not susceptible of partition without loss and injury to those interested; and that it would be for the benefit and advantage of all concerned that it should be sold under the decree of the court and the proceeds distributed to the heirs at law.

The bill prayed for the appointment of commissioners to assign dower to the widow; for a sale after such assignment, and the division of the residue after payment of the debts "amongst the parties interested in the premises and concerned in the proceeds of sale."

The widow answered that she desired her dower interest should be ascertained, assigned, and set apart to her by due proceedings under the direction of the court; and she and the other defendants assent generally to the prayers of the bill.

Testimony was taken in support of the bill, but none as to the values of the several lots; and in February, 1888, a decree was passed, in substance, assigning to the widow the lot 18 in square 367, known as the "Homestead," as and for her dower in the real estate in these proceedings mentioned, finding an indebtedness of \$300 with interest due to the complainant, and directing the sale of all of the other property by trustees for the purpose of paying the debts of the

intestate, and other charges and liabilities of his estate, and for division and distribution of the proceeds amongst his heirs at law, parties to this suit, clear and discharged of and from all claim of dower of the widow therein and thereto. The trustees on the 21st of June, 1888, filed their report, stating they had sold the property, omitting the lot in which dower was assigned, for \$17,434.

On the 26th of June, five days after the sale, the widow filed her petition, alleging that previous to the signing of the decree in this cause, without being represented by counsel, and relying upon the advice of friends, she consented to and did agree to accept the "Homestead" occupied by herself and her late husband at his death, as and for her dower in his estate; that the same was supposed to be, both by herself and other parties to this suit, at a fair valuation, equal to one-third in value of the said real estate, and was so taken by her and was intended to be apportioned to her on that basis; that since the decree in this cause the residue of the estate has been sold and has brought a price largely in excess of the estimated values, so that the house and premises which was assigned to her by mutual agreement is now ascertained to be much less than one-third in value of her said husband's estate; that all of the other parties to the cause, or at least some of them, are desirous of carrying out the intention which actuated the assignment of dower as aforesaid, to wit, that she should have her full one-third value of said estate for life. She asks as relief that the cause be referred to the Auditor to take proof to ascertain the fair value of the said premises occupied by her, and also to state what her dower would amount to in the property sold, that she might have her one-third in value of the whole estate by assignment of the said "Homestead" as part thereof, and by having the residue thereof invested and the interest and income therefrom paid to her during her life, and a prayer for general relief.

Four of the heirs at law assented to the granting of the

application ; but the other heir, Thomas E. Young, interposed a demurrer to the petition. The equity justice in July confirmed the sales and directed the Auditor to take proof as to the fair value of the lot so assigned to the widow by the decree passed in February, and report whether such value is equal to one-third of the value of the whole real estate, taking the amount of the sales thus reported by the trustees as the basis of such estimate.

The Auditor, upon the testimony taken by him,	
reported the value of the dower lot as.....	\$5,000.00
Amount of sales of the residue by the trustees..	17,434.60

Making the entire valuation on this basis..	22,434.60
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At this valuation, the widow's one-third of the	
entire value should be.....	\$7,478.20
Whereas the value of lot assigned was.....	5,000.00

Making a difference against the widow of.	2,478.20
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At this valuation the widow, instead of receiving one-third in value of her husband's lands to hold as her dower, only received less than *one-fourth* in value of the estate ; while the five heirs who should have been entitled, according to the estimate of the decree, only to \$10,000, had received \$17,479, an excess of \$7,479 over their supposed share. The Auditor, under the direction of the court, stated and filed with his report alternative distribution accounts, whereby it appears that if the petition of the widow be granted, the said sum of \$2,478.20 would be reserved from present distribution and should be set apart for additional dower to the widow, the interest or income therefrom to be enjoyed by her during her life and the *corpus* turned over to the heirs at law at her death.

The Equity Court sustained the demurrer interposed by Thomas E. Young, and dismissed the petition ; and the appeal is taken from this order.

In behalf of the demurrant it is insisted (1), That the widow is entitled to no relief at all in the premises, as she with full means of knowledge, agreed to receive lot 18, in square 867, in full of her claim of dower in her husband's estate, and that its undervaluation was a mere error of judgment on her part; and (2), That if she have any claim to relief it should have been sought by bill of review to set aside the decree of February, 1888, and cannot be obtained by petition.

The entire controversy between the widow and four of the heirs on the one side, and the remaining heir on the other, is presented by her petition and the demurrer. The facts thus charged and admitted assert substantially that the widow only consented to receive lot 18 upon the belief upon the part of herself and all the heirs that she would thereby receive a full one-third in value of her husband's realty, to hold for her life; and that the residue of the realty would not exceed twice in value of her dower land, and that it was upon these terms only the agreement was entered into; and these averments are also admitted by the answers of the other heirs. It cannot be supposed the widow would have sanctioned the proposed agreement if she had ascertained before it was ratified by the court's decree, that the first supposition was so grossly wrong. It appears she made the agreement without the aid of counsel, confiding in the advice of friends; and that about three months after the decree, and very soon after the report of the trustees, she filed her application.

Nor can it be questioned that it would be most inequitable to allow the demurrant to profit by such a mutual misunderstanding, to which he contributed quite as much as his sister-in-law, even if the claimant were an ordinary contractor, dealing about the affairs of a stranger.

But we cannot lose sight of the consideration that the petitioner is the widow of the man whose real estate is the subject of this contention, and that as such she occupies a

position especially favored at law, as well as in courts of equity; that life, liberty, and dower are classed together by the great authorities as the cherished objects of the law, and that a large part of the Great Charter of liberties was especially devoted to the security of this right. Besides the positive declaration that the widow's dower should always be secured to her free from all costs and charges, it provided in numerous particulars securities for its enjoyment. Every provision of the Great Charter, 9 Henry III, Ch. 7, referring to this subject was adopted in Maryland as part of its law, and devolved upon this jurisdiction. The widow is recognized as a purchaser for a fair consideration (1798, Ch. 101, Subch. 13, Sec. 5), an attitude as consonant with justice as with law; and as a favored creditor. *Gibson vs. McCormick*, 10 G. & J., 67. She has a moral right to be provided for and have a maintenance and sustenance out of her husband's estate. And upon this moral law the law of England is founded as to the right of dower. 1 Story Eq., Sec. 629. And part of the husband's obligation is to provide for his widow after his death.

The present application is in accordance with the course of the common law in cases where there has been an improper or erroneous assignment of dower. The assignment in this instance was not according to either of the five common law methods pointed out in the books. But dower may also be assigned by arrangement between the widow and heirs, and such assignment may be by parol. *Marshall vs. McPherson*, 8 Gill & J., 333. Such assignments are technically said to be "against common right."

The court of equity having undoubted concurrent jurisdiction of the general subject, had the full right to confirm the agreement made in this instance, as it did in the decree; and to exercise its jurisdiction over the subject generally in sympathy with the course of the common law in dealing with dower. 4 Kent's Com., 72.

At law the right of the heir to have a re-admeasurement

of dower, where the assignment had been excessive, was well recognized; and 13 Edw. 1, Ch. 7, West., 2d, provided that a writ of admeasurement of dower might be granted to a guardian to abate such excessive assignment, and that the heir, when he came of age, should not be bound by the action of the guardian if he had "feignedly and by collusion" failed in such suit, but that the heir still "may admeasure the dower as it ought to be admeasured by the law of England."

And on the other hand it is equally well settled that if the dowress be evicted of part of her dower land, after assignment she may be endowed anew out of other lands of her husband. Where dower was assigned the widow by the heir, or by the sheriff, on a recovery against the heir there is an implied warranty, and if the tenant in dower is impleaded by one having a paramount title, she may vouch and recover against the heir a third part or the two remaining parts of the land of which she is dowable. *Park on Dower*, 275; *Mantz vs. Buchanan*, 1 Md. Ch. Dec., 206. No reason can be given why a re-admeasurement should not also be had where the widow has been evicted of *part* only of a parcel of land assigned as her dower, and without complete eviction its value has been greatly reduced. We should expect a more liberal application of these just principles in courts of equity than at law, as equity can mould its remedies to abate injuries that might result from technical rules at common law.

This lady has been denied her unquestioned right, and it is our duty to see that she receives it, if we can.

Can the relief be granted on the present application?

We do not regard the decree as final, except as to the authority to sell the supposed two-thirds free of the widow's dower. The entire proceeds of sale are here for distribution.

It is not sought by the petition to change or set aside the decree. The application is rather in the nature of a bill to

carry a decree into execution where on circumstances it may consider the former directions and vary them in case of a mistake. Mitford's Equity Pl., 96. This was the course adopted in *Mantz vs. Buchanan*, 1 Md. Ch., Sec. 206, on a petition filed in the High Court of Chancery at Annapolis to allow the widow an equivalent of the proceeds then in that court from the sale of the husband's remaining lands for the loss of part of her dower land, which had previously been assigned her in the circuit court for Washington County. See, also, *Thomas vs. Wood*, 1 Md. Ch. Dec., 299.

Why put the widow to the expense of a bill of review to accomplish this end against the spirit of Magna Charta, which declares that "the widow shall give nothing for her dower?"

The loss to the demurrant will be insignificant; only the loss of the interest on about \$500 during the life of the widow of his brother, from whom alone he has any claim.

The decree sustaining the demurrer is reversed and the cause remanded.

JOHN A. SCHNEIDER

vs.

THE DISTRICT OF COLUMBIA ET AL.

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1. A special assessment should be for the street improvement specified in the contract, and for no other.
 2. The power of the District Commissioners to revise special assessments of the Board of Public Works (Act of June 19, 1878), does not include the power to add charges for improvements not named in the original assessment.

At Law. No. 28,037. Decided January 14, 1880.

The CHIEF JUSTICE and Justices JAMES and MONTGOMERY sitting.

PETITION in *certiorari* brought to procure the annulment of certain special assessments of taxes against petitioner's property.

THE FACTS are stated in the opinion.

Messrs. BIRNEY & BIRNEY for petitioner:

The special assessments complained of are in violation of the statutes in the following particulars:

1. The "statement of costs" of each improvement includes sundry items not embraced in the respective contracts. First Gen. Leg. Assembly, Act of August 10, 1871.

2. Each "statement of costs" was made more than two years after the completion of the improvement. *Id.*

3. The assessments were not officially authenticated by the signatures of the District Commissioners. Bensinger's Case, 6 Mackey, 285.

4. Each of the "revised assessments" contains several charges not contained in the original assessment. Act of June 19, 1878.

5. No complaint having been made under the provisions of the Act of June 19, 1878, the Commissioners were without jurisdiction to revise the original assessments. *Id.*

Mr. A. G. RIDDLE for defendant.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

The petitioner states that he owns lots 8 and 9, square 893, Washington City; that lot 8 fronts both on Eighth street east and on Maryland avenue. Lot 9 fronts on Maryland avenue. For alleged special improvements on Eighth street east, the District Commissioners have issued to the Treasurer of the United States lien certificate 13,428 against lot 8, and for same on Maryland lien certificates 7,164 and 7,165, the latter against lot 8 and the former against lot 9. They threaten to sell the land. The special assessments on which said certificates were issued are not lawful and the interest charged is unlawful.

The Treasurer of the United States has answered, admitting that he holds the lien certificates against the lots, as alleged in the petition.

The District of Columbia has made return, in which they set forth the several steps that have been taken in the proceedings by the municipal authorities.

It is not necessary for us to mention or notice all of the points made by the petitioner in argument against the validity of this assessment. By reference to the return of the District of Columbia, and the exhibits, we find that a contract was made between the parties on June 5, 1872, not signed by all the members of the Board of Public Works, but the contract calls for grading, curbing and laying sidewalks. The assessment which was made originally was simply for a carriageway. The carriageway does not appear to be any part of the improvement provided for in the original contract. This assessment was revised under the Act of 1878, and it appears that the assessment for the carriageway was reduced from \$138.38 to \$35.28. But four other items, not contained in the original assessment, were entered in this revision, thus in effect making the revision an original assessment as to all of the items which were embraced in it and not embraced in the original assessment.

We are satisfied that under the law the Commissioners had no power, when revising assessments, to add items not included in the original assessment as matters to be charged against the property; and we think it was not competent in the original assessment to assess for anything but what was embraced in the contract between the parties; that it was not competent to make a contract for a certain improvement, for the doing of certain work upon the streets, any part of the cost of which was to be charged against the abutting property, and then, when the work was completed, or some work done (whether that work or some other), to make an assessment against the parties for the doing of work entirely different from that contracted for. For that reason this assessment will be quashed. And this pertains to the two improvements made, the one on Maryland avenue and the other on Eighth street. The same vice is found in each assessment.

Judgment quashing the assessments and certificates.

JOHN H. HARMON

vs.

THE WASHINGTON AND GEORGETOWN RR. CO.

1. In an action for damages to recover for injuries received by reason of the negligence of the defendant, the burden is upon the defendant to show by a preponderance of evidence contributory negligence on the part of the plaintiff if that is set up as a defense.
2. In establishing such preponderance the defendant is not confined to the testimony offered in his own behalf, but he may adopt such of the plaintiff's testimony as tends to show contributory negligence.
3. An instruction which leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory, should not be granted.
4. The court should not rule as a matter of law that the plaintiff has been guilty of contributory negligence unless the facts on which such a ruling must rest are undisputed.
5. Contributory negligence cannot be attributed to the plaintiff, merely because he was negligently guilty of an act which exposed him to a possible danger having no relation to the accident which actually occurred.
6. A passenger upon a street car has a legal right that the car shall not merely slow up but shall actually stop in order to allow him to alight, and he has a right to assume that this will be done; if, therefore, the passenger, for the purpose of alighting, gets upon the car-step while the car is slowing, but, instead of stopping, it suddenly starts again with a jerk by reason of which the passenger is thrown from the car and injured, he is not to be charged with contributory negligence by being upon the step while the car was in motion, for he had a right to anticipate that the car would stop, and there was, *in contemplation of law*, no risk that the car would start again, either with a sudden jerk or otherwise, until he alighted.

At Law. No. 24,010. Decided June 27, 1889.
Justices HAGNER, JAMES and MONTGOMERY sitting.

MOTION by plaintiff for a new trial on a bill of exceptions in an action for damages.

Messrs. L. H. PIKE and C. C. COLE for plaintiff.

Mr. W. D. DAVIDGE for defendant.

THE FACTS are sufficiently stated in the opinion.

Mr. Justice JAMES delivered the opinion of the Court:

This is an action for injuries sustained by reason of the

defendant's negligence, in causing the plaintiff to fall from one of its cars. The plaintiff testified, in his own behalf, that on the evening of the 28th of April, 1882, at about 9 o'clock, he took passage in one of the defendant's cars on Pennsylvania avenue to go to his home on Nineteenth street; that he took his seat about two-thirds of the distance from the rear platform; that at or near Nineteenth street he signaled to the conductor to let him off; that the conductor was then inside the car figuring up his accounts under the light; that, upon receiving the signal, the conductor rang the bell and the car began to slow up, and, as he supposed, was about stopping; that there were not many passengers inside, but the platform was crowded; that he made his way through the crowd on the platform and down on to the step which was occupied by a man and a boy, who held on to the railings on each end of the step; that the car was, at that time, almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on the step the bell was rung and the car started, and he was thereby thrown off on to the pavement and injured. He further stated that the conductor did not go out to the platform to assist him to get off. On cross-examination he said that, at the time of his attempting to get off, there were only six or eight passengers inside of the car, while the platform was so crowded that the man and boy referred to had to stand upon the step.

On the part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars and of getting off while the car was in motion; that when the plaintiff signaled on the night in question he, the conductor, rang the bell and the car began to slow; that he was then standing on the rear platform; that he and a small boy were the only persons then on the platform; that the plaintiff, "without waiting for the car to stop, after so signalling the conductor, immediately went out on the rear platform and stepped down upon the step, at the same time

holding on to the iron railing on the car, and while the car was still in motion and moving at a slow rate of speed, nearly at a standstill, the plaintiff stepped off, and after he had let go of the car he, the conductor, pulled the bell to go on again, and as the plaintiff turned he fell; * * * that he did not ring the bell for the car to start until after the plaintiff had stepped on the street and let go of the car."

All of the testimony in the case is set out in the record, but enough has been stated to show the bearing of the exceptions taken by the defendant, the appellant. At the close of the testimony the plaintiff asked the following instruction, which was given: "If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and that while the plaintiff was waiting for the car to stop, and before it had fully stopped, the car started suddenly forward through the negligent act of the conductor or driver, and that the plaintiff was thereby, and without any negligence on his part, thrown from the car and injured, then he is entitled to recover."

To this instruction the defendant excepts on the ground that it commits the subject of negligence to the jury in general terms, without any rule to guide them. It appears to be to the effect that, if the jury should find that the sudden starting of the car, while the plaintiff was waiting to get off, was negligence, and that the plaintiff was thereby thrown off and injured, and that the plaintiff had not done any negligent act, then they should find for the plaintiff. As to the negligence of the defendant, a definite problem was submitted to the jury. They were to determine whether the injury was caused by a certain act of the defendant, and whether that was negligence; and whether that act was a question which a jury is competent to decide without further guidance. In one respect the instruction as to the plaintiff's negligence was erroneous; but the error was against the party asking it. The jury were allowed to consider whether

the injury was "without *any* negligence on his part," and to deny him a verdict if there was *any* such negligence, whether contributory or not. Of this improper limitation of the plaintiff's right, however, it is not for the defendant to complain.

On the part of the defendant the following instruction was asked and refused: "The burden of proof is upon the plaintiff to satisfy the jury that he sustained the injury which is the subject of this action, by reason of the negligence of the defendant and without contributory negligence on his part." In support of his exception to the court's refusal to give this instruction the defendant cited *The Indianapolis R.R. vs. Hurst*, 93 U. S., 298. In that case the Circuit Court had charged the jury that "the burden of proving contributory negligence rests on the defendant; and it will not avail the defendant, unless it has been established by a preponderance of the evidence." The Supreme Court held that this was correct, and added the following comment: "The Court did not say that if such negligence were established by the plaintiff's evidence the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might without it be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof or insufficient proof on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in anywise neutralizing the effect of the testimony the plaintiff had given, if there was any bearing on the point, adversely to him."

This court has repeatedly applied this rule. It rests upon the very simple principle that no person is *presumed*

to have done wrong or to have been in fault. He must be shown to have been so. The same principle which requires proof against the defendant requires proof against the plaintiff, and negligence on the part of the plaintiff is purely a defensive proposition and *a part of the defendant's case*. If evidence tending to establish that proposition comes out in the plaintiff's proof of the circumstances of the injury, it is of course available to the defendant; but it is treated in that case precisely as it would be treated if that evidence had been produced by him. It may be said to be weighed by the jury as his evidence, and the burden is on him that there shall be a preponderance of evidence against the plaintiff on the question of contributory negligence. The question is not whether the plaintiff has acquitted himself of negligence, but whether the defendant, by adopting what comes from the plaintiff's witnesses and by what he produced himself, has a preponderance of evidence to the effect that the plaintiff had contributed to his injury by his own negligence. But it is not worth while to dwell upon the grounds of this rule; the question has been absolutely settled and closed by superior authority.

The defendant next complains that the court refused the following instructions: "There is evidence in this cause from which the jury may infer contributory negligence on the part of the plaintiff, and if the jury find the same, the plaintiff is not entitled to recover."

We think it would not have been proper to treat that question in that way. Such an instruction would contain the very vice which the exceptant imputes to the first instruction given at the instance of the plaintiff. It leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory. It points out nothing for their consideration, and could only have effect as an indefinite and misleading intimation that there was evidence of contributory negligence.

On the other hand, the court covered the same ground in its charge to the jury. The trial justice there said: "If the plaintiff undertook, after requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving necessarily some imprudence; so I take it; and if that act was the cause of his *falling*, it would amount, in my judgment, to contributory negligence, and would defeat his action." This part of the charge gave the defendant more than he asked in his rejected prayer. If this instruction, however, had not been given in the charge, the prayer would still have been properly refused. It was substantially wrong and was also misleading as a detached proposition.

The next exception argued by the defendant is, that the court erred in refusing to rule that the plaintiff *in law* contributed to the injury. The facts on which such an instruction must rest were themselves in dispute. The court could so instruct only upon an undisputed basis.

The remaining exceptions are to the charge. The court began by stating that the case suggested four theories as to the cause of the accident complained of, and then stated these theories as follows:

1. "In the first place the testimony on the part of the defendant is to the effect that the plaintiff *had descended from the car in safety*, and that he stepped and fell from some cause not attributable to the conduct of the defendant, but from some unforeseen accident. If you find that to be the case, it is perfectly apparent that there is no ground of action at all."

2. "If the plaintiff undertook, after requesting the conductor to stop the car, *to descend from the car while it was still in motion*, however slowly it might be going, that is an act involving necessarily some imprudence; so I take it; *and if that act was the cause of his falling* it would amount, in my judgment, to contributory negligence, and would defeat his action.

3. "If you were satisfied that it was an act of carelessness on his part to come out on the crowded platform and step down on the step while it was already occupied by other people, so that he had to stand between them, and had no means of supporting himself, and in consequence of that alone, he fell from the car, without any other cause—I say, if you are satisfied that that was an act of carelessness on his part, and that it was the direct cause of his falling from the car, that would also amount to contributory negligence, which would defeat his right to recover."

4. "If you are satisfied that while he was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety and no accident would have happened, but that, instead of so doing the conductor, either negligently failed to observe whether or not he had alighted, or seeing him there neglected to await until he had alighted and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, and that threw him down and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

To so much of the charge as was stated under the first, third and fourth of these theories or conditions of the evidence, the defendant excepted.

We do not perceive any ground for his exception to the first theory. It was wholly in his favor. His exception to the third seems to be taken on the ground that the hypothesis contained in it showed contributory negligence in law, and that, therefore, the question of contributory negligence should not have been left to the jury at all. We are of opinion that this hypothesis involved questions of fact which the court had no right to decide, and that the whole question of negligence, and of the actual cause of the accident, was properly and necessarily left to the jury.

At the argument, however, the defendant's most serious

objection was to the charge of the court upon the fourth hypothesis or theory of the evidence. For the sake of clearness, we repeat this part of the charge: "If you are satisfied that while he (plaintiff) was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety, and no accident would have happened, but that, instead of so doing, the conductor *either negligently failed to observe* whether or not he had alighted, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, and that that threw him down and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

This presents for consideration the doctrine of proximate or effective cause in cases of injury.

In any such case the facts may show that the plaintiff simply hurt himself, or that he helped to hurt himself, while the defendant also hurt him; or they may show that, although the plaintiff had been guilty of some negligence, he cannot be said to have thereby hurt himself or to have helped to hurt himself, and that it was really the defendant who caused the injury. In the first and second conditions of fact the plaintiff cannot recover; in the last he can.

By the instruction just recited the court undertook to give the jury a rule for determining whether the plaintiff should be held by them to have helped to hurt himself, or whether, in spite of his antecedent imprudence in being on the step, the real *cause* of his being hurt was the act of the defendant. Was this rule correctly given? In order to determine the effect of an instruction it is sometimes convenient to recast it.

The jury were substantially told that, even if they should think it was imprudent in the plaintiff to step down onto

the step before the car had stopped, yet if they were satisfied that no harm would have come of his doing so if the conductor had allowed the car to stop, and were satisfied that, instead of allowing it to stop, the conductor gave a signal to go on, and that in consequence of that a sudden jerk caused the plaintiff to fall off the step, and that in giving this signal and thus causing the jerk the conductor was negligent, either *by reason of failing to observe*, before he gave it, whether or not the plaintiff had alighted, or by reason of failing to wait till the plaintiff had alighted after seeing that he had not done so—then they should find that the defendant's negligence was *the cause* of the injury.

The defendant's printed argument says of this instruction: "The court erred in ruling that if the jury found that the plaintiff was, in fact, *guilty of contributory negligence* in descending to the steps under the circumstances, he could still recover if the conductor either negligently failed to see him there or saw him there and then started the car and thereby threw him off." And he thereupon argued that the authorities allow a recovery by one who has himself been negligent in those cases only where the defendant had actually discovered the plaintiff's resulting danger and had time, after so discovering it, to counteract it and failed to use his opportunity.

As to this mode of stating the court's ruling it is to be observed first that it misconstrues the instruction. The jury were *not* told that, even if the plaintiff "was, in fact, guilty of contributory negligence," he might still recover on the conditions supposed. On the contrary, they were plainly made to understand that they were first to determine whether the plaintiff's negligence was *contributory*; and they were further told, in effect, that it was not to be treated as contributory if they found that it was after all the defendant's negligence which rendered fatal what would otherwise have been harmless. And then, for the purpose of applying this test of the true cause of the injury, the jury were

authorized by the instruction to treat *a failure to observe* whether a passenger, about to alight, was safely off the car before it was started again as a negligence, which was the proximate cause; in other words, *the cause* of the injury.

It is proper, however, to consider the aspects of the case as presented by the defendant. It was insisted at the argument that, by placing himself upon the step of the car, the plaintiff was guilty of a negligence which exposed him to the injury which befell him, and that such negligence must be considered to be a contributory cause of that injury, unless it is shown that the defendant *became aware of plaintiff's danger*, and was by such knowledge charged with a duty to avert its consequences, and that he neglected that duty. It was admitted that in such a case the negligence of the defendant in not counteracting a peril which he saw, would be the proximate cause, and, therefore, in law the cause of the injury; but it was claimed that where the defendant was only negligent in not seeing that the plaintiff was in danger the case was simply one of two similar and co-operative negligences, and that the defendant's negligence could not then be treated as the cause of the injury. In support of this proposition the defendant referred to cases in which the injury happened when the plaintiff and defendant were using the same highway, and it was claimed that the principle established by those authorities is that when the plaintiff has been guilty of negligence, the defendant cannot be held liable, unless it is shown that he had actual knowledge of the plaintiff's condition of peril and was *then* negligent of his duty to try to avoid the injury.

It is unnecessary to consider in this case whether, in the class of cases referred to, a defendant's *negligent omission to observe* that he had the opportunity to render the plaintiff's negligence harmless should have the same effect to charge him, as the proximate cause of the injury, which his omission of duty in that respect, after actually seeing that he had that opportunity, is admitted to have. The question

which we have to determine is, what is the effect of a passenger-carrier's *omission to observe* whether a passenger, whom he is setting down, has actually alighted; and this question is governed by the law of this particular business.

It is to be remembered that, by the hypothesis of the instruction now under consideration, the matter in hand was *the delivery* of a passenger; that the car had slowed in order that he might alight; that the passenger was on the platform step for the purpose of alighting, and that his carrier, without observing whether the delivery was completed, started the car again, with a sudden jerk, and threw him off.

Now, the omission in such a case was not, as in the cases referred to, an omission to observe that a person had placed himself in danger of being hurt by him whereby he himself was called upon to exercise care to avert that consequence; it was not as merely a dangerous position, that the fact of his passenger's being still on the platform step was to be observed by him, but as a fact involving the question whether his passenger's delivery had yet been completed by his alighting. It was part of his own employment to observe whether an alighting passenger had actually alighted before he should start his car again. The legal aspect of *his* omission was that it was a failure to observe whether he had completed his own work of delivering his passenger; and if he did not attend to that duty, and did not give his passenger time enough to get off before he started again, it was necessarily this negligence of a common carrier's duty that did the mischief. The duty spoken of in the authorities referred to by the defendant stands upon a wholly different principle. In those cases the duty was one owing to a person solely because he was in danger of being hurt; in this case the duty was owed to one whom the defendant had undertaken to deliver, and who was to be allowed by the defendant to alight without any interruption of his alighting."

But, as the plaintiff's "imprudence" in being on the platform step was dwelt upon by the defendant as an act of

negligence, and was adverted to in the court's instruction, it is proper to consider further the legal aspect of that act, and especially whether it could possibly be regarded as a negligence, *contributory to his being jerked off by the starting again of the car.*

It is an essential element of all the cases in which the plaintiff has been held guilty of contributory negligence by being in the wrong place that he thereby put himself in the way of precisely what happened to him, and his doing so was negligence just because he disregarded that risk. For example, when a person walks upon a railway track, his doing so is held to be negligence because he incurred the risk of the very injury that befell him. It is irrelevant to consider whether he thereby exposed himself to some other kind of mishap. Negligent exposure of that kind could not be contributory to the mishap that did occur; and so here. It is irrelevant to the defendant's exception that the plaintiff may, by going onto the platform step before the car stopped, have put himself at the risk of *falling* off by reason of some motion of the car, since that could not be contributory to his being jerked off by the conductor's starting again. The question is whether he exposed himself to this last peril and thereby contributed to the injury which actually happened. Now, the hypothesis of the charge is that the plaintiff, being a passenger carried by a common carrier of passengers, had demanded a stoppage of the car in order that he might alight. He had a legal right that the car should not merely slow up but actually stop for that purpose, and there was, *in contemplation of law*, no risk that it would start again, either with sudden jerk or otherwise, until he should have alighted. Nothing was to be anticipated by him but a complete performance of the carrier's duty. It was on his part a matter of course, because it was a part of the law of passenger carrying that no sudden starting should interrupt the cause of his alighting. Even if it be true that he put himself in peril of falling before

the car came to a standstill he cannot be said to have put himself in peril of being in this way jerked off and thus to have contributed to his being jerked off by the conductor. On the other hand it does not lie in the mouth of the carrier to object that the passenger made it easy for him to be jerked off by a starting of the car, which constituted a violation of the carrier's duty to that passenger.

On the hypothesis of the charge, then, no case of two *contributory* negligences can arise. The negligence of the conductor in failing to observe whether his passenger had alighted before he caused the car to start again, thereby throwing him off, would necessarily be *the cause* of the injury.

In conclusion, we deem it important to state again the duty of this class of carriers. It is the legal duty of the conductor of a street-car to *stop* his car when a passenger is about to alight; it is his legal duty to observe a passenger who is alighting and to be sure that he has actually alighted, before he starts his car again; and if he hurts his passenger by any neglect of his duty it is immaterial whether that neglect consisted of not observing what it was his particular business to observe, or of not doing what it was his particular business to do after he had observed.

We find no error in the rulings of the court, and we find in the case stated no reason to question the verdict of the jury.

Judgment is therefore affirmed.

AMELIA A. BADEN

vs.

CHRISTOPHER C. McKENNY AND THOMAS E.
YOUNG.

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1. Where one has been absent from his home and family for eleven years, and has never been heard of during that period, his death will be presumed.
 2. The value of a widow's dower in lands aliened by her husband is to be determined according to their value at the time of the valuation, deducting therefrom any increase which may have arisen from the labor and money of the purchaser.

In Equity. No. 11,215. Decided June 24, 1880.
Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from a decree in equity upon a bill filed to obtain an assignment of dower.

THE CASE is stated in the opinion.

Messrs. W. WHEELER and JAMES HOBAN for complainant:

The evidence shows that the lot enhanced in value after title acquired by Young and before the death of plaintiff's husband in 1887.

The court referred the case to the Auditor with instructions to ascertain the value of the lot in 1875, when Young acquired title. The complainant claims that the value is to be taken according to its value at the time of her husband's death, when it was more valuable, and hence this appeal from said order, which settled the only material point in the case so far as complainant's right may be concluded by an allowance of dower under said order of reference. See *Bowie vs. Berry*, 1 Md. Ch., 452; *Hitch vs. Davis*, 3 *Id.*, 266.

Mr. WESTEL WILLOUGHBY for defendants:

Authorities are conflicting as to the allowance of increased value arising from extrinsic causes. Even such increased value cannot be allowed by the authorities of Virginia and New York.

In *Todd vs. Baylor*, 4 Leigh., 498, the syllabus is: "Upon a bill in equity by a widow against the alienee of her husband for dower of lands aliened by her husband in his lifetime, the widow is dowable of the lands as of the value thereof at the time of the alienation, not at the assignment of dower. She is entitled to no advantage from enhancement of value either by improvements made by the alienee or from general rise in the value, or from any cause whatever.

In *Dorchester vs. Coventry*, 11 John., 510, the court say: "The widow does not have the benefit of the improvements or of the increased value or appreciation of the land; the defendant must accordingly have judgment for one-third of the premises in value as they were at the alienation of the husband.

In *Hall vs. James*, 6 John. Ch., 258, Kent, J., the land had decreased in value. *Held*, that the same rule applies. It should be the same both as to the widow and the purchaser. See also *Humphrey vs. Finney*, 2 John., 584.

It would not be proper to decree a sale of the property. 17 Rich., 248; 15 Mass., 164; 2 N. H., 56; 7 Pickering, 193; 79 Am. Dec., 603; 80 *Id.*, 707.

Decree for specific sum cannot be assigned without consent of all parties. 7 Cranch., 370.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

On the 19th day of December last, this cause was submitted to the court below on pleadings and proofs; two decrees were made, the first dismissing the bill as to the defendant McKenny, and the last adjudging that the "dower interest of the complainant in the property in controversy should be determined according to the value of the property in the year 1875," and referring it to the Auditor "to take further proof as to the value of the premises" in 1875, from which last decree the complainant appealed.

The bill was filed on the 20th day of June last. It averred, among other things, that complainant in the year 1860

intermarried with one Basil Baden, who in July, 1887, died intestate, and who during coverture was "seized in fee simple" of a part of lot 9 and all of lot 10, in square 173, in this city; that this property is worth \$2,500; that Mr. Baden "made disposition thereof without complainant's consent," and that by "*mesne* conveyances it passed to and is held and owned by defendant Young."

Complainant prays for "dower in said real estate," and if such dower cannot be "assigned in specie," then that such "real estate may be sold," and "a just equivalent in money may be decreed to her in lieu thereof." Mr. Young, in his answer, declined to admit the death of Mr. Baden, but did admit the ownership and purchase of the property by him as averred in the bill, except that he asserts that he *contracted* for it in 1878 or 1879, and was afterwards compelled to resort to a bill in equity for specific performance, which he did, obtaining his decree in the year 1880, at which time the property was worth, he alleges, about \$300. His answer also avers that he had paid out sums in improvements and taxes on the property, such sum aggregating about \$700, and he denies that it is now worth \$2,500.

The marriage is proven, as alleged in the bill. It is also proven, and not disputed, that Mr. and Mrs. Baden lived together here as husband and wife from the time they were married until the month of March, 1878, when he left and went to some place unknown to the complainant, and that she has never since heard anything from him.

It also appears from the evidence that Mr. Baden sold the property to one Essex Roberts upon contract in 1875, and that Mr. Roberts sold to defendant, Young, also upon contract, in 1878. Some testimony as to value was also taken and filed prior to the submission of the cause below.

The decree appealed from is treated by all concerned as having established finally the basis upon which complainant's interest is to be determined, and no question is made, but an appeal lies from such a decree.

Neither is the legal propriety of the joinder of the de-

fendants questioned, and we, therefore, *assume* that such joinder was correct. *Allen vs. Meloy*, 8 Ohio, 463; 2 Scribner on Dower, 158-9; *Marshal vs. Anderson*, 1 B. & Mon. (Ky.), 198; *Barney vs. Frowner*, 9 Ala., 901; *Boynen vs. Lancaster*, 2 P. & H. (Va.), 198.

Mr. Young's counsel urges *first*, "that there is no competent evidence of Mr. Baden's death, and *second*, that the complainant is entitled to dower at all in these lands is only "dowable * * * as of the value thereof at the time of alienation" by the husband.

It is true that Mr. Baden's death is not directly proven, but it is fairly shown, and seems to be undisputed that he left his home and family eleven years ago, and has never been heard of since.

The rule seems well settled that "after the lapse of seven years without intelligence concerning a person, the presumption of life ceases." 1 Greenleaf on Evidence, 57; 1 Bishop on Marriage and Divorce, 452; *Rice vs. Rice*, 10 Ohio St., 996; *Newman vs. Jenkins*, 10 Pick., 515; *Bailey vs. Bailey*, 36 Mich., 182; *Rosenthal vs. Mayhugh*, 33 Ohio St., 155; *Whiting vs. Nicoll*, 46 Ill., 235. We must, therefore, for the purposes of this suit presume the death of Mr. Baden.

Now, should the interest of complainant be determined according to the value of the property at the time of alienation by the husband, or shall she be permitted to profit by its enhanced value, if any, which "has arisen from extrinsic and general causes."

When Mr. Baden became seized of these lands his wife's inchoate right of dower attached, and her title thereto became "consummate" at his death. 4 Kent's Com., 67; *Price vs. Hobbs*, 47 Md., 381.

"The alienation of the husband conferred no title on the alienee as against the wife in respect of her dower." 1 Scribner on Dower, 603.

The right of dower is a "strictly legal right." 1 Story's Eq. Jurisp., 624.

It is highly favored in equity. *Id.*, 629, 630.

It "was one of the three principal favorites of the common law." 4 Kent's Com., 62.

We are unable to see any good reason why the dower of this woman in these lands "must be regulated by the value thereof at the time of alienation." On the contrary we are satisfied upon principle that while she cannot be allowed to share in "the improved value * * * which has arisen from the actual labor and money of the owner," she should not be denied her dower interest in such part of their improved value, if any, as "has arisen from extrinsic and general causes," and this view is, we think, supported by the great weight of authority in this country. 2 Scribner on Dower, 618; 4 Kent's Com., 68; *Bowie vs. Berry*, 1 Md. Ch. Dec., 452; *Mosher vs. Mosher*, 15 Me., 371; *Price vs. Hobbs*, 47 Md., 381; *Green vs. Tenant*, 2 Har. (Del), 336; *Summers vs. Bab.*, 13 Ill., 483; *Thomson vs. Morrow*, 5 Serg. and Rawle, 289; 1 Washb. on Real Property, 289 (239); *Powell vs. Morrison*, 3 Mason R., 347; *Dunseth vs. Bank*, 6 Ohio, 77; *Allen vs. McCoy*, 8 Ohio, 463.

We have not overlooked the authorities which assert the true rule to be that "the widow must take her dower according to the value of the land at the time of the alienation," and among them are *Tod vs. Baylor*, 4 Leigh., 498; *Hobbs vs. Harvey*, 16 Me., 80; *Rankin vs. Oliphant*, 9 Mo., 239; *Barine vs. Freeman*, 9 Ala., 901; *Wilson vs. Oatman*, 2 Blackf., 223; *Van Gelder vs. Post*, 2 Edw. Ch., 577; *Catlin vs. Ware*, 9 Mass., 218; *Shaw vs. White*, 13 John. R. 179; *Walker vs. Schuyler*, 10 Wend., 486; *Hale vs. James*, 6 John. Ch., 258; *Dorchester vs. Coventry*, 11 John., 510.

The New York cases, however, rest upon a statute enacted in 1806, which declares that "dower of any lands sold by the husband shall be according to the value of the lands, exclusive of the improvements made since the sale. 2 Scribner on Dower, 614; *Walker vs. Schuyler*, 10 Wend., 483; *Dorchester vs. Coventry*, 11 John., 510; *Allen vs. McCoy*, 8 Ohio, 463.

And in *Dorchester vs. Coventry* the court declares that it could not be "presumed that the legislature intended to make a distinction between the improvements and the increased value of the land."

In support of his position upon this question counsel for Mr. Young cites three of the cases above referred to, viz: *Tod vs. Baylor*, *Hale vs. James*, and *Dorchester vs. Coventry*.

In the *first* it appears that the husband aliened in 1801, and died twenty-three years later. Meanwhile the purchaser had expended \$1,270 in permanent improvements. In 1827 the widow exhibited her bill, praying dower in the land so aliened. The chancellor decreed that "dower be allotted according to the present value of the lands with all its improvements."

The Court of Appeals reversed the decree, declaring that "when the husband alienes during coverture the widow shall not be entitled to dower according to the *improved value* of the land, but must take her dower according to the value at the time of alienation."

In *Hale vs. James*, the husband of complainant mortgaged the land in dispute to the defendant in 1814, and some years afterwards conveyed to defendant his equity of redemption. He died in 1821, and a few months later his widow filed her bill asking for dower.

When mortgaged, the lands, "*exclusive* of subsequent improvements," were worth \$9,600; when conveyed, \$7,333, and at the husband's death, \$6,166, it was held that the *date* of the *deed* was to be "deemed to be the period of alienation, at which the valuation was to be taken," and that such value should be "estimated without regard to the subsequent improvements made by the purchaser."

In *Dorchester vs. Coventry*, the husband conveyed in 1804 and died in 1813—when conveyed, the land was worth \$500.

On the trial of the cause brought by the widow to recover dower, it appeared that the value of the land was *then* \$1,750 "exclusive of buildings erected since the alienation."

It was held that the widow was entitled to "have judgment according to the value of the land at the time of the alienation." The court says that the statute (of 1806 above referred to) "cannot admit of any other reasonable interpretation." And then follows the language above quoted.

In most, if not all, of the cases outside of New York, and in many, or most of the New York cases, the question passed upon was not whether the widow should or should not have the benefit of the increased value "which had arisen from extrinsic or general causes," but it was whether or not the increased value which had arisen from the actual labor and money of the ailensee should be shared by her in accordance with what seems to be the rule established in England. 2 Scribner on Dower, 604.

Very few, if any, authorities can be found in this country in conflict with the doctrine declared by Judge Story in *Powell vs. Morrison*, that the widow whose husband has, without her consent, aliened land of which he was seized, and in which she had an inchoate right of dower, was entitled to such interest "as would be equal in value to one just third part" of "the present value, * * * exclusive of the increased value occasioned by the building and improvements on the premises since the alienation thereof by the husband," and such we regard as the settled law of the land, in the absence of statutory provision.

We think that in this case the complainant is entitled to a decree directing that the value of her "dower interest * * * in the property in controversy is to be determined according to the value of such property at the present time, less the amount, if anything, which has arisen from the actual labor and money of the owner." It should be ascertained what sum this property would now be fairly worth if the expenditures and improvements alleged to have been made by Mr. Young since he purchased, had not been made.

The cause will be remanded to the court below for further action in conformity with this opinion.

W. B. WILLIAMS

vs.

S. T. LUCKETT.

1. Where the property of a stranger to the writ has been levied on, a demand is not necessary before bringing replevin.
2. Where personal property has been conveyed by a chattel deed of trust to secure an indebtedness and is afterwards, while remaining in the grantor's possession, levied on to satisfy an execution, it is not error, on replevin brought by the trustee, to refuse to instruct the jury that if they believe the *cestui que trust* allowed the property to remain in the grantor's hands for an unreasonable time after the maturity of the indebtedness a presumption was raised that the debt was paid or that the deed of trust was held unreleased only as a protection against other creditors of the grantor; it is sufficient if the court instruct the jury that if they believe the indebtedness recovered to be *bona fide* the plaintiff is entitled to recover.

At Law. No. 27,177. Decided June 26, 1889.

Justices HAGNER, JAMES and MONTGOMERY sitting.

MOTION for a new trial on a bill of exceptions in an action of replevin, the verdict having been for the plaintiff.

THE FACTS are sufficiently stated in the opinion.

Mr. L. C. WILLIAMSON for plaintiff.

Mr. E. H. THOMAS for defendant.

Mr. Justice HAGNER delivered the opinion of the Court:

This is an action of replevin, brought by Williams against Lockett, a constable. Under a deed of trust Williams, as trustee, held title to certain personal property, which was levied on by the constable, Lockett, to collect a debt alleged to be due by Peterson, the grantor in the deed of trust. At the trial the verdict was rendered for the plaintiff; and the defendant on this appeal presents several objections to the rulings below.

The first question before us arises upon the evidence. Testimony was offered by the plaintiff showing the levy by the defendant to satisfy an execution, which he held as constable against the grantor in the deed, and also "tending to

show that the goods described in the declaration were embraced in the description of the goods in said trust," which was objected to by the defendant. We think the testimony was plainly admissible. As disclosed in the argument, the objection really went to the sufficiency of the proof, and not to its admissibility, and was properly overruled.

The first prayer offered by the defendant was "that to entitle the plaintiff to recover in this action a demand for the return of the property replevied should have been made before suit." The same idea is involved in his fifth prayer. It is true the question has at times been regarded as an open one; and in the case of *Bridget vs. Cornish*, in 1 Mackey, Chief Justice Cartter declared the court declined to decide the question in that case. But we are all of the opinion that the matter is no longer one of doubt, and that the court below was right in refusing the instructions.

Four other prayers offered by the defendant were refused by the court. The second and third present the idea, that if the jury should find the *cestui que trust* permitted the grantor to remain in possession of the property for an unreasonable time after default had occurred in payment of the debt, then the presumption arose that the debt was paid, or that the deed of trust was held unreleased, only as a protection against the other creditors of the grantor. We think all the defendant was entitled to ask upon this point was embraced in the instruction given by the court which was, that if the debt secured by the deed should be found by the jury to be a *bona fide* debt, the plaintiff was entitled to recover. All in the prayers that went beyond this was faulty and was properly refused. The court's instruction submitted the correct hypothesis to the jury, who found in favor of the plaintiff, and that verdict, in our opinion should stand.

Judgment affirmed.

HARRIET A. B. CORTS

vs.

THE DISTRICT OF COLUMBIA.

1. Where a defect in a street pavement will be dangerous when covered with ice or snow, and the defendant, a municipality, has knowledge of that fact, the occurrence of a snow-storm is immediate notice to it that the pavement, at that point, is in a dangerous condition.
2. Where a defective pavement is not rendered practically impassable by reason of such defect, a person passing along the same is not guilty of contributory negligence unless there is an omission to exercise proper care.
3. In an action to recover damages for injuries received by reason of the defendant's negligence, it appearing that plaintiff was discharged by her employer by reason of disability resulting from the injury which prevented her from performing her duties, evidence of the salary received by her in such employment is competent as tending to show the capacity for earning income which the plaintiff possessed and was exercising at the time of the injury.
4. So, evidence of value of the work which plaintiff has been able to do since the injury is competent for the purpose of showing how far plaintiff's capacity to do work has been impaired by reason of the injury.
5. Where there is a general exception to the admission of testimony if the testimony is competent for any purpose the exception will be overruled.

At Law. No. 24,569. Decided January 21, 1889.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

MOTION for a new trial on a bill of exceptions.

THE FACTS are stated in the opinion.

Mr. JAMES COLEMAN for plaintiff:

The questions—whether the defect in the sidewalk where the plaintiff fell was dangerous to persons passing along the same; whether it was properly and safely secured to guard against accident; whether it had existed for a sufficient length of time to make the defendant chargeable with notice; and whether the plaintiff was without fault and in the exercise of ordinary care at the time when she fell upon the sidewalk—were each and all questions for the jury, and

were submitted to them by the court under instructions, which are fully sustained by authority. *Bank of Washington vs. Triplett*, 1 Peters, 25; *Greenleaf vs. Birth*, 9 Peters, 291; *Weightman vs. City of Washington*, 1 Black, 49.

It is immaterial whether the defendant had actual notice of the defect.

It is sufficient to entitle the plaintiff to recover, if the defect was of such a character and had existed for such a length of time that the defendant, in the exercise of proper supervision of its streets, ought to have known of the defect and remedied it.

And this is for the jury. *Mayor vs. Sheffield*, 4 Wall., 189; *R.R. Co. vs. Stout*, 17 Wall., 657.

It is urged by the appellant that the court below erred in admitting testimony offered by the plaintiff to show the loss of business sustained by her, by reason and as the result of the injury she received.

The evidence showed that by reason of the injury the plaintiff's hip was injured and her ankle broken and sprained; that at the time she was working as a clerk in the War Department on a salary of \$900 per year; that owing to her injury she was unable to attend to her duties and lost her business.

This was the direct and necessary consequence of the injury, and for this the plaintiff is entitled to recover.

In *Wade vs. Leroy*, 20 How., U. S. 34, the plaintiff was wounded in consequence of a collision between two boats. By reason of the injury he sustained he was prevented from carrying on his business. The court say that this loss of business was "the direct and necessary consequence of the injury, and sustained strictly and almost exclusively as an effect from it." A verdict in favor of the plaintiff was sustained, and this, notwithstanding the declaration did not contain special allegation of such loss of business. Upon this point, that the plaintiff in this class of cases is entitled to recover for loss of business, we further cite *Chicago & C.*

RR. Co. *vs.* Lombart, 119 Ill., 255; Baldwin *vs.* Western RR. Co., 4 Gray, 333; Knuff *vs.* Sioux City RR. Co., 71 Iowa, 41; Missouri Pacific RR. Co. *vs.* Texas Pacific RR. Co., 30 Fed. Rep., 169; Conner *vs.* Pioneer and Const. Co., 29 *Id.*, 629; McDonald *vs.* Long Island RR. Co., 50 N. Y. S. C., 637; Phillips *vs.* Southwestern RR. Co., L. R., 42 Q. B. Div., 406; Erghott *vs.* New York, 96 N. Y., 264; Kessel *vs.* Butler, 53 *Id.*, 612; Joslin *vs.* Grand Rapids Ice Co., 53 Mich., 322; Nebraska City *vs.* Campbell, 2 Blackf., 590.

"The mere fact that a traveler is familiar with the road and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge is a circumstance, and perhaps a strong circumstance, but it should be submitted with the other facts of the case to the jury for them to determine whether with such knowledge the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or in proceeding used ordinary care to avoid injury." *Sherman & Redfield on Neg.*, Sec. 376.

In the case of *Bullock vs. Mayor, etc., of New York*, 99 N. Y. 654, where it appeared that the flagging of the sidewalk had been torn up, causing a defect over which the plaintiff passed and was injured, the court say:

"It was the duty of the city to maintain this sidewalk in a reasonably safe condition for public use, and whether it did or not is a question for the jury." Citing: *Diveny vs. City of Elmira*, 51 N. Y., 512; *Todd vs. City of Troy*, 61 *Id.*, 506; *Clemence vs. City of Auburn*, 66 *Id.*, 334; *Evans vs. City of Utica*, 69 *Id.*, 166; *Niven vs. City of Rochester*, 76 *Id.*, 619; *Weed vs. Village of Ballston Spa.*, *Id.*, 329; *Saulsbury vs. Village of Ithaca*, 94 *Id.*, 27; *Dewin vs. Bailey*, 131 Mass., 169.

The court, after citing these authorities, further say:

"The plaintiff had the right to use this walk, although she knew its condition, and whether she was guilty of any

carelessness which contributed to the accident was also a question for the jury."

In the case of *Kavanaugh vs. The City of Janesville*, 24 Wis., 619, which was an action to recover for injuries sustained by reason of a defect in the sidewalk, the court say:

"Nor do we think there is any ground for saying that she was guilty of negligence because she attempted to pass along the walk, then well knowing its dangerous condition. She was passing along with due caution—as we must assume after the verdict of the jury—one of the public streets of the city, which was defective and out of repair. She had passed there many times before safely, notwithstanding its dangerous condition, and because she attempted to do so again we are asked to hold, as a matter of law, that she was guilty of negligence that directly contributed to the injury. This we cannot do."

This case was followed by *Wheeler vs. Town of Westport*, 30 Wis., 392. Where an injury was sustained owing to a defect in the highway, of which the plaintiff had knowledge, Judge Dixon closes a very lengthy and able opinion on this question, reviewing many authorities, sustaining the verdict in the court below, saying:

"In the present case we cannot say as matter of law that the plaintiff in passing along the road was bound at all times by day or night to bear in mind and think of the obstruction, although he knew it was there."

This has been the uniform ruling in the courts of Wisconsin. *Townley vs. C. M. & St. P. RR. Co.*, 53 Wis., 626; *Spensley vs. Lancashire Ins. Co.*, 54 *Id.*, 433; *Sabotta vs. St. Paul F. & M. Ins. Co.*, 54 *Id.*, 687; *Hill vs. Fon du Lac*, 56 *Id.*, 242; *Johnson vs. C. & N. W. RR. Co.*, 56 *Id.*, 274; *Nelson vs. C. M. & St. P. RR. Co.*, 60 *Id.*, 320; *Kaples vs. Orth*, 61 *Id.*, 531; *Hoye vs. C. & N. W. RR. Co.*, 60 *Id.*, 666, and same case again before the court and reported in 67 Wis.

The courts in Massachusetts have always held this to be

the law. *Reed vs. Northfield*, 13 Pick., 94; *Smith vs. Lowell*, 6 Allen, 39; *Snow vs. Housatonic RR. Co.*, 8 *Id.*, 441, 450; *Frost vs. Waltham*, 12 *Id.*, 85; *Fox vs. Sackett*, 10 *Id.*, 535; *Mahoney vs. The Metropolitan RR. Co.*, 104 Mass., 73; *Lyman vs. Amherst*, 107 Mass., 339, and numerous other cases.

In Pennsylvania:

Plaintiff was injured by the fall of a bridge over which he was passing, which he knew to be defective; *held*, that he could recover. *Humphreys vs. Armstrong Co.*, 36 Pa. St., 204.

In Missouri:

Plaintiff knew the street was dangerous when he entered upon it.

The court say:

"The fact that a person injured through a defect in a highway or street had previous knowledge of the defect is not conclusive evidence of knowledge on his part. It is a fact to be submitted with the other evidence to the jury." *Smith vs. The City of St. Joseph*, 45 Mo., 449.

In Iowa:

The plaintiff stepped down a perpendicular declivity in the sidewalk, which he knew to be there; the court say, if the doctrine of knowledge of the defect is to excuse the city from liability "all, then, that a city need to do to escape its obligations to keep its sidewalks and streets in repair would be to notify its inhabitants that the streets and sidewalks are in an unsafe condition." *Rice vs. The City of Des Moines*, 40 Iowa, 638.

In New Hampshire:

The courts hold that the question of reasonable or ordinary care, in view of plaintiff's knowledge of the defect in the road, should be submitted to the jury. *Griffin vs. Auburn*, 58 N. H., 121.

In Minnesota it is held that the question of knowledge is for the jury. *Erd vs. The City of St. Paul*, 22 Minn., 443.

In Illinois:

The plaintiff stepped into a hole in the sidewalk which was covered with snow, and although she knew of the defect, the court held her entitled to recover. *City of Aurora vs. Dale*, 90 Ill., 46.

In Connecticut the same doctrine is held. *Dooley vs. The City of Meriden*, 44 Conn., 118.

In Indiana it is held that previous knowledge of the defective condition of a turnpike will not alone prevent the plaintiff from recovering. *The Henry Co. Turnpike Co. vs. Jackson*, 86 Ind., 111.

In Vermont the plaintiff drove his horse and cutter into a cradle-hole covered by a snow-drift. He had known it had been there for three weeks.

Court held the plaintiff could recover, notwithstanding he knew of the defect. *Coates vs. Canaan*, 51 Vt., 131; *Montgomery vs. Night*, 72 Ala., 411; *Pomfrey vs. Saratoga*, 104 N. Y., 459; *Noble vs. Richmond*, 31 Gratt., 271; *Baltimore vs. Holmes*, 39 Md., 243.

The same rule prevails in England. *Clayards vs. De-thick*, 12 Q. B. Rep., 439.

Mr. H. E. DAVIS for defendant.

Mr. JUSTICE JAMES delivered the opinion of the Court:

This is an action for injuries alleged to have been caused by the defendant's neglect of duty in its care and management of streets. The ground of complaint in the original declaration was that an accumulation of ice and snow was, after due notice, negligently suffered to lie on the sidewalk on the south side of Pennsylvania avenue, between Fourteenth and Fifteenth streets, whereby the plaintiff's injuries were caused. The ground of complaint in the first amended declaration was that a defect in the pavement itself had long been negligently suffered by the defendant to continue at the place above mentioned, and that by means of this defect, and of a coating of ice and snow, the injuries complained of had been caused.

More than three years afterwards a third declaration was filed containing the same allegations and the following in addition :

"That the plaintiff, at the time aforesaid, to wit, on the 4th day of February, 1882, was a clerk in the employ of the United States, being such clerk in the War Department of the United States, and receiving pay for her services as such clerk the sum of \$100 per month ; that by means of such injuries so sustained by her as aforesaid she became sick and lame so as to be unable to attend upon and discharge her duties as aforesaid, and was by means thereof compelled to be frequently absent from her position and service as such clerk ; and that by reason thereof she, the said plaintiff, was on the 15th day of October, 1885, discharged from her said position as clerk aforesaid, so that she thereafter failed to receive the said payment for her said services, and the same became and was and is wholly lost to her, the said plaintiff, to her damage of \$5,000."

"That the plaintiff, at the time aforesaid, to wit, on the 4th day of February, A. D. 1882, was and for a long time prior thereto had been in the full possession of her physical strength and health, and that by reason of said injury the said plaintiff was and is permanently hindered and prevented from attending to her necessary and lawful business, to her damage of \$20,000."

The defendant pleaded to this last declaration :

"1. That it is not guilty as the said plaintiff hath alleged.

"2. And, for a further plea, the defendant says that the alleged cause of action set out in the plaintiff's supplemental and amended declaration did not accrue within three years next before the filing of said supplemental and amended declaration herein."

It does not appear in the record that any joinder was filed. The case, however, proceeded to trial as if issue had been joined on the plea of limitation. At the argument

it was accordingly insisted that the last declaration sets out a new cause of action, accrued three years before it was filed.

This argument substantially assumes that the amendment complains that the defendant had wrongfully deprived the plaintiff of an office and of its emoluments. We find, however, that it only complains of the original injury, and that its purpose and effect are merely to state a special damage resulting from that injury. Whether such special damage is recoverable in this action is not the question. It is enough that no new *cause of action* is set out.

We proceed, then, to consider the case stated.

The testimony tended to show that, for a considerable time before the injury suffered by the plaintiff, two adjoining sections of the sidewalk, at the place referred to, had been of unequal level, and that these unequal planes had been connected by a declivity about 8 or 9 inches wide, forming a somewhat steep descent declining eastward; that the plaintiff, after leaving the Quartermaster General's Office, her place of employment, walked along the sidewalk eastward toward Fourteenth street, and stepped upon this eastward declivity and slipped and fell, and was thereby greatly injured. It also tends to show that this declivity had been made slippery and dangerous to foot passengers by either ice or snow lying upon it. Whether ice had formed there is disputed, but it is not disputed that this declivity was a defect, and that it was covered at least with snow; nor does it seem to be disputed in the argument for the defendant that it was rendered dangerous by whatever was lying upon it, whether it was snow or ice.

The defendant insisted at the argument that upon these facts no recovery could be had under the declaration in this case. The allegations referred to are as follows: "Yet, nevertheless, the plaintiff alleges that heretofore, to wit, on the 4th day of February, A. D. 1882, the said highway and sidewalk was out of repair and in a dangerous condition

by reason of the gross negligence and default of the defendant, of all which the defendant had notice; yet, nevertheless, to wit, on the day and year aforesaid, the defendant, not performing or regarding its duty as aforesaid, wrongfully permitted and allowed the said public highway and sidewalk or street as aforesaid to be and remain out of repair and in a dangerous and unsafe condition, unguarded and without fixing or placing, or causing to be fixed or placed, any light or lights, signal or signals, barricades or other warning or protection, at or near the boundary line on said sidewalk, between lots 1414 and 1416 on Pennsylvania avenue, in said District, at which place there was a certain steep and precipitous descent on the sidewalk from lot 1414 to lot 1416, caused by the grade of the sidewalk in front of lot 1416 having been raised above the grade of the sidewalk in front of said lot 1414 about 10 inches, which said sidewalk, at the place aforesaid, was at the time aforesaid covered with ice and snow; by means of, and in consequence of such gross negligence and failure of defendant to perform its duty in that respect aforesaid, the plaintiff then and there, to wit, on the day and year aforesaid, at about 4 o'clock in the afternoon of said day, while walking moderately and carefully along said street and sidewalk in front of said lots Nos. 1414 and 1416 on said Pennsylvania avenue, stepped her foot *upon said steep and precipitous descent so covered with snow and ice* as aforesaid, in endeavoring to pass along and over the same, which was then and there, and for a long time had been, in and on the sidewalk aforesaid, at the place aforesaid, left unguarded and unprotected in any manner whatsoever as aforesaid, through the gross negligence and default of the defendant, whereby the plaintiff was thrown down to and upon said steep and precipitous descent so covered with ice and snow as aforesaid."

These allegations are to the effect that the dangerous defect by which the plaintiff suffered injury consisted of a certain inequality and declivity in the pavement and of a

coating of ice and snow, and that the defendant had such notice of this condition as to render it liable for injuries thereby produced. The question is, what facts may be held equivalent to the case stated in the declaration.

It was argued on the part of the defendant that as there is no allegation that the declivity in the pavement was of itself a dangerous defect, the gravamen of the complaint is that the snow was negligently allowed to lie there after sufficient notice, and that the proof did not show such a lapse of time after the storm as to justify a finding that the defendant had knowledge that the snow had caused a dangerous defect. This argument assumes that the snow is substantially the dangerous defect alleged by the plaintiff, and that knowledge of this substantive defect can be inferred only after lapse of time.

The evidence tended to prove that the inequality and abrupt declivity referred to was itself a defect; that this defect had long been known to the defendant; that it was a natural consequence that it should become slippery and dangerous when coated with snow or ice, and that it actually became dangerous by this means. It was unnecessary to prove that in this climate snow was to be expected; that was a fact known to the jury by common experience and without special proof, and is, therefore, to be regarded as a part of the situation which the evidence tended to prove. The question, then, is what knowledge does such evidence bring home to the defendant? We think that, upon proof to this effect, the jury had a right to find that the defendant had antecedent knowledge that the pavement was defective, knew that snow-storms were likely to occur and must be expected in this climate, knew that the natural consequence of the presence of snow upon such a declivity was that this defect should become slippery and dangerous, and necessarily knew, in common with all persons in this District, that a snow-storm had occurred. In other words, the jury had a right to find that the defendant had notice that the declivity

in question was in a dangerous condition at once upon the happening of the snow-storm.

It is the knowledge of existing danger which imposes the duty to act, and this knowledge may be shown by circumstances. In certain cases, where the dangerous defect has come without warning, knowledge that it has come is to be imputed only after the lapse of reasonable time for finding it out by the exercise of due diligence in the work of supervision; but when the defendant had notice that the danger would exist in a certain event, and then knew that the event had occurred, the law imposes at once the duties and liabilities which follow knowledge. There is no reason to allow time for finding out what must be assumed to be known, because it is the duty of the party to know it.

According to these principles, the jury were justified by the weight of the evidence, as we think, in finding that the defendant knew, on the morning of the injury, that the defect in question had become dangerous, and that the defendant's omission to place there any warning to foot passengers by 4 o'clock in the afternoon, when the injury occurred, was negligence.

We have considered the case of *Clark vs. Chicago*, 4 Bissell, 486, and *Chicago vs. McGiven*, 78 Ill., 347, cited on the part of the defendant. We concur with the dissent of the chief justice in the last-named case.

We think, then, that the evidence of the defendant's negligence was admissible under the declaration in this case, and that its weight tended to establish such negligence.

But it is claimed by the defendant that the plaintiff's own testimony shows that she was guilty of contributory negligence. After describing an irregular and sunken spot in the declivity which has been mentioned as the spot where she fell, and stating that she was in the habit of passing along that sidewalk every day, the plaintiff testified as follows:

"That the snow remained upon the sidewalk upon which

the plaintiff fell during the day of the accident, and was there when the plaintiff fell that afternoon; that it was several inches deep; that she did not observe this depression in the sidewalk at the time she fell; that the snow was quite deep there and she could not see the hollow; that she could not see the ridge as she stepped there in front of 1416; that it would have been impossible; that in addition to the depth of the snow that had fallen it had drifted; that that is witness' recollection; that as she came along the place the day of the accident, although she knew of the depression or ditch or hole, and that it had been there for a year, the only thing that she had in mind was to get through that snow, and she tried to walk where she had seen others walk; that there was no path, and the footsteps of people who had passed showed her that the snow was deep; that she knew where she was at the time of the accident of course, but had no thought in her mind as to exactly where she was; that she could not say that she did not know that the sidewalk there was uneven, and that she had always been careful in going down there, because she did know it; that she could not say that at the moment of the accident she had it in mind as she was walking along with as much care as she could; that it had kept cold all during that day and the air was full of snow; that the snow had been falling most all day, and it was a very cold, wintry day; that she stepped into the snow and her right foot slipped forward and her left foot doubled under, and she came down on it very hard and she felt jarred all over."

It was urged on the part of the defendant that the plaintiff admitted that she had knowledge of the danger, and therefore should have gone from her office to the car by some other route; in other words, that the use of a route which she knew to be dangerous was contributory negligence.

In *Muller vs. District of Columbia*, 5 Mackey, 286, decided by this court in 1886, the court stated the law as

to proof of contributory negligence as follows: "The law throws on the defendant, in an action of this kind, the *onus* of proving contributory negligence, and that proof is not made out by merely showing the knowledge by complainant of the defect complained of in the highway. If the highway is wholly impassable and in such a condition that no reasonable man would attempt to pass it, the plaintiff does so at his own risk; but if it is not, and especially if it is the only access to his dwelling, the only duty on his part is the exercise of proper care to avoid accidents, and the burden is upon the defendant, not only to show knowledge of the defect on the part of the plaintiff, but to show, affirmatively, negligence, or the omission to take proper care."

Mr. Justice Cox, in delivering the opinion of the court, referred with approval to the case of Prince George's County vs. Burgess, 61 Md., 31. In that case the court, speaking of the danger in question, which was a hole in the floor of a bridge, said: "The simple fact of its existence, with the knowledge of the plaintiff, was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part; but the *onus* of showing that such care and prudence were not exercised still rested on the defendants."

It was not pretended that the sidewalk was impassable, so that the only question is whether the evidence shows contributory negligence in the plaintiff's manner of passing. Her own testimony was relied on as to this point, and we think it does not show that she omitted care or took upon herself the risk. We think that upon the evidence that question was for the jury, and that their decision was consistent with the weight of the evidence.

We have to consider next the admission of certain evidence offered by the plaintiff and excepted to by the defendant. The plaintiff, having testified that she continued to be employed by the Quartermaster-General as a clerk until the autumn of 1884, when she was discharged because of inability produced by her injury, was asked what salary she received as such clerk, and answered that she received \$1,200 a year. The propriety of such evidence as this, for the purpose of showing that a person who has a certain capacity to earn income has suffered accordingly, when that capacity has been impaired by the injury in question, was considered by Mr. Justice HAGNER, speaking for the court, in *Woodbury vs. The District*, 5 Mackey, 128. We think the testimony excepted to tended to show the grade or capacity which the plaintiff possessed and was exercising before and at the time of the injury alleged, and was competent.

The following questions and answers were also admitted and excepted to: "State whether or not you have been able since your discharge to perform the regular services that would be required of you as a copyist in any office or in any department of the Government." To which the witness answered: "I could not do daily work. I could not count on myself to go and attend to daily work that would require me daily to go out, because I am often so lame that it would be utterly impossible." The witness was then asked: "What has been the value of the work that you have been *able to do* since your discharge?" To which the witness answered: "It has not averaged me \$10 a month since I was discharged."

We think that this was competent evidence to show the extent to which the plaintiff's *capacity to do work* was impaired by the injury complained of, and that, under the general exception taken, it was admissible if competent for any purpose.

At the conclusion of the testimony the defendant moved the court to instruct the jury that upon the whole evidence

the plaintiff was not entitled to recover, and that the verdict of the jury should be for the defendant upon the grounds, first, that she was guilty of contributory negligence; second, that upon the evidence defendant is not liable in this action.

To the court's request to grant this instruction the plaintiff excepted.

Thereupon the court gave the following instructions at the instance of the plaintiff:

First. The defendant has the exclusive care and control of the sidewalks and streets within the District of Columbia, and it is the duty of the defendant to see that they are kept safe for the passage of persons and property to the extent stated in the sixth instruction granted at the instance of defendant, and if it neglects this duty and in consequence thereof any person is injured, it will be liable for the damage sustained.

Second. If the jury find from the evidence that the plaintiff, while walking along the sidewalk on Pennsylvania avenue, in front of lots 1414 and 1416, in the District of Columbia, without fault or negligence on her part, and while in the exercise of due care, slipped and fell and was injured thereby, and that the sidewalk in question where the plaintiff slipped and fell was out of repair, and was also covered with snow and ice, and that such defective condition, together with the fact of its being covered with snow and ice, rendered it unsafe for the passage of persons over the same, and that by reason of its defective condition, together with its being covered with snow and ice, the plaintiff fell thereon and was thereby injured, then she is entitled to recover in this action.

Third. Before the plaintiff can recover, however, the jury must be satisfied from the evidence that such defect in the sidewalk had existed for a sufficient length of time to charge the defendant with notice of its existence—that is, for a sufficient length of time so that the defendant, in the exercise of reasonable care in the supervision of its streets ought to have known of the defect and remedied it.

Fourth. The question of negligence on the part of defendant; of defect in the sidewalk; of whether the defect had existed for a sufficient length of time to make the defendant chargeable with notice; whether the plaintiff was without fault and in the exercise of due care, and whether the plaintiff was injured, and the extent of such injury and the damage sustained thereby, are each and all questions of fact for the jury.

Fifth. If the jury find for the plaintiff it is their duty in determining the amount of damage the plaintiff has sustained to consider those things which would be the natural result of her injury, viz: Loss of time, service, and business; the direct expense she has incurred for medical attendance, treatment and medicines, and mental, bodily and physical suffering, and her probable future condition as affected by the injury.

To the granting of these prayers, the defendant excepted.

Thereupon the defendant asked of the court thirteen instructions to the jury, of which the following, numbered as follows, were refused:

1. The jury is instructed that the defendant is not liable in this action.

2. The jury is instructed that upon the evidence the defendant is not liable in this action.

3. The jury is instructed that under the form of Government as existing at the time of the accident complained of by the plaintiff the defendant is not liable in this action.

4. The jury is instructed that under its form of Government as existing at the time of the accident complained of the defendant could not, nor could any one of its officers be guilty of such negligence as is charged in this action so as to make the defendant liable herein.

5. The jury is instructed that if it finds from the evidence that the accident complained of by the plaintiff

happened more three years next before the filing of the supplemental and amended declaration in this case—that is to say, more than three years next before the 2d day of July, 1887—the plaintiff is not entitled to recover in this action.

7. The jury is instructed that if it finds from the evidence that the alleged defect in the sidewalk where the plaintiff fell consisted (apart from the presence of ice or snow) in an inequality or unevenness in the pavement, but not such an inequality or unevenness as to prevent the sidewalk being reasonably safe for the use of persons exercising ordinary care and prudence, the defendant is not liable in this action.

8. The jury is instructed that if it finds from the evidence that the portion of the sidewalk on which the plaintiff fell was, in the absence of ice or snow, reasonably safe for the use of persons exercising ordinary care and prudence, the presence thereon of ice or snow, or both, in the manner and under the circumstance related in the testimony, does not render the defendant liable in this action.

9. The jury is instructed that if it finds from the evidence that the plaintiff's falling, as described by her, was occasioned by the slipperiness of the place at which she fell, due to the presence of ice or snow, or both, at such place, under the circumstances described in the testimony, and that but for the presence of such ice or snow, or both, the plaintiff would not have fallen, the defendant is not liable in this action.

11. The jury is instructed that if it finds from the evidence that the alleged defect in the sidewalk where the plaintiff fell was of such a character that the defendant was bound to take notice of it, so that it was guilty of negligence in not repairing it, and the plaintiff had full and equal knowledge with the defendant of the said defect, she was

guilty of contributory negligence in venturing upon it, and cannot recover in this action.

13. The jury is instructed that, in considering the question of damages, it cannot, on the pleadings in this cause, take into account the fact of the plaintiff's employment in the service of the United States or the amount of her salary in that employment, but must confine itself to considering the physical injury to the plaintiff and her sufferings, if any, on account thereof.

It is not material to state the instructions granted at the request of the appellant, the defendant. After they were granted the court gave to the jury the following in lieu of the sixth instruction asked by the plaintiff:

"If the jury find from the evidence that at the place of the accident described in the declaration there was a defect in the sidewalk resulting from the omission of the defendant to keep the same in repair, which was either dangerous in itself or obviously calculated to endanger the safety of people passing over it when covered with ice or snow, such as ordinarily accumulated and might be expected at the season when the accident happened, and when in the condition in which it was at the time of the accident, and was in fact unsafe at the time in question, and the accident complained of resulted from such unsafe condition; and they further find that the defect in the sidewalk had continued so long that the defendant knew, or ought to have known it, then the plaintiff is entitled to recover unless she was herself guilty of negligence is not using ordinary or reasonable care to guard against the accident, or as explained in instructions numbers ten and twelve, given at the instance of defendant; and unless such negligence on the part of the plaintiff appears from the evidence offered on her behalf, the burden of proving the same rests upon the defendant."

We do not find it necessary to discuss the instructions actually given and refused. It is enough to say that the

action of the Circuit Court, especially in giving the instruction last mentioned, was in accord with the view we have stated in this opinion.

The jury fixed the plaintiff's damages at \$6,000, and it is objected that this was excessive, and that a new trial should be granted on that ground. It may be that another jury would have given less, but we cannot say that there is ground for holding that this verdict was excessive. It was given in the exercise of their judgment and we shall not disturb it.

Judgment affirmed.

H. P. GILBERT

vs.

THOMAS P. MORGAN.

1. In the absence of an express repeal a later statute may be held to have worked a constructive repeal of an earlier one.
2. This may happen in two classes of cases; first, where it plainly appears, upon a comparison of the old and new legislation, that it was the intention of the legislature to take up *de novo* the whole of the subject to which it related, and to make in the new statute whatever provision it intended to allow concerning that subject; second, the courts must construe a later statute as intending a repeal of all earlier legislation which they find to be repugnant to it.
3. A statute cannot be held to be repealed for repugnancy if the new statute leaves any opportunity for its application.
4. The Act of February 25, 1879, providing for the holding of two terms of the Circuit Court, does not interfere with the operation of the Act of June 23, 1874, when only one term of the Circuit Court is being held.

At Law. No. 28,431. Decided February 11, 1889.

The CHIEF JUSTICE and Justices HAGNER, COX, JAMES and MONTGOMERY sitting.

MOTION to remand a cause from the Criminal to the Circuit Court. Heard in General Term in the first instance.

THE FACTS are stated in the opinion.

Messrs. WM. F. MATTINGLY and WM. A. COOK in support of the motion.

Messrs. FRED. W. JONES, A. G. RIDDLE, and W. D. DAVIDGE *contra*.

Mr. Justice JAMES delivered the opinion of the Court:

By an order of February 1, 1889, the Chief Justice held the Circuit Court assigned certain cases from number three hundred to number four hundred on his calendar to be heard by Mr. Justice Montgomery, holding the criminal term of this court, with the petit juries drawn for such criminal term. The parties in this cause moved the court to remand it to the special term of the Circuit Court, on

the ground that the juries drawn for the criminal term were not authorized by any law to sit in the trial of civil cases. That motion has been certified to the General Term by Mr. Justice Montgomery, and the question presented is, whether the Act of June 23, 1874, Ch. 454, 18 Stat. at Large, 204, is still in force.

That act provided "That the justice of the Supreme Court of the District of Columbia holding a criminal term for said District may, when not engaged in the proper business of the criminal term, hold sittings of the Circuit Court, and employ the petit juries drawn for the criminal term in the trial of such cases depending in said Circuit Court as the justice presiding therein may assign to him for that purpose; and the business done at such sittings shall be recorded in the minutes of the Circuit Court."

It is argued on the motion that this act was repealed by the operation of Sections 3 and 5 of the Act of February 25, 1879, Ch. 99; 20 Stat., 320, Sec. 3, provides that "the General Term may order two terms of the Circuit Court to be held at the same time, whenever, in their judgment the business therein shall require it; and they shall designate, by an order of the court, the time and places of holding the same, and the justices by whom they shall respectively be held; and shall make all necessary orders for a division of the docket between the justices holding such term. And petit juries shall be drawn therefor in the same manner as is provided for in such Circuit Court, at least ten days before the commencement of any such sitting."

The fifth section provides that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

In the absence of an express repeal a later statute may be held to have worked a constructive repeal of an earlier one. We use this term because the result is reached by the ordinary judicial process of construing the intention of the statute. This may happen in two classes of cases: first,

where it plainly appears, upon a comparison of the old and new legislation, that it was the intention of the legislature to take up *de novo* the whole of the subject to which it related, and to make, in the new statute, whatever provision it intended to allow concerning that subject; second, the courts must construe a later statute as intending a repeal of all earlier legislation which they find to be repugnant to it.

It was urged at the argument that the Act of 1879 manifestly intended to provide a comprehensive and sufficient system for disposing of cases pending in the Circuit Court, and must, therefore, be construed as intending to repeal the Act of 1874, whether the latter was repugnant or not. We think no such construction can be given to the Act of 1879. We know judicially that there have been different degrees of exigency in the business of the trial courts, and the Act of 1879 appears on its face to be intended to provide only for one of these; in other words, to be an additional and not a complete provision.

The Act of 1874 contemplated the fact that the justice holding the Criminal Court and his juries might be, and sometimes were, unemployed for lack of work. Its object was to provide them with work, and at the same time to aid the dispatch of business in the Circuit Court. The Act of 1879 contemplated a still more serious exigency, namely, that the Circuit Court was liable, from time to time, to be overwhelmed with cases, and its object was to provide for the peculiar exigencies of that condition. To construe such a provision as being intended to be the sole and sufficient provision would be to impute a deliberate intention to let the justice and juries of the Criminal Court lie idle when they might have work, and would involve the curious antithesis that Congress was at the same time solicitous that there should be juries enough to do the work, and willing that juries who might help to do it should not help. It is not permissible to construe a provision to be the sole and sufficient resource, if it is possible to treat it as an ad-

ditional resource. We cannot, therefore, hold that the Act of 1879 superseded the earlier act, by reason of its being itself a complete disposal of the subject.

The next question is, whether the Act of 1874 was repugnant to the latter act and must on that ground be held inoperative and repealed. The rule on this subject is very strict. An act cannot be held to be repealed for repugnancy if the new act leaves any opportunity for its application. Does the Act of 1879 permit the existence of occasions to which the Act of 1874 may be applied?

It is argued that when two terms of the Circuit Court are ordered to be held at the same time, the General Term controls the assignment of the cases pending there, and that the power given by the Act of 1874 to the justice holding the Circuit Court to make certain assignments cannot then be exercised. That question is not before us, and we distinctly omit to decide it. But if it be conceded, for the argument, that neither of the circuit justices could, at such times, exercise this power, in other words that, at such times, the action of the General Term is exclusive, it must be remembered that the General Term may omit to order two terms, and that when it does so we have precisely the condition to which the Act of 1874 had always applied. If the repugnancy arises from the actual operation of the Act of 1879, it does not arise when that act is not put in operation. Without deciding what effect the appointment of two circuit terms would have as to this question, we are of opinion that the minimum effect of the two statutes is as follows: When only one term of the Circuit Court is held at the same time, the justice holding that term has power, under the Act of 1874, to assign cases to the justice holding the Criminal Court. When two terms are ordered by the General Term the latter has exclusive control of assignments. The legal effect of such a construction would be, that the Act of 1874 applies to one condition of the court, the Act of 1879 to another and different one. There can

be no repugnancy between laws which do not relate to the same thing. We have to repeat here that we do not intend by this view even to imply a decision of the question which might be presented, when two terms of the Circuit Court are ordered by the General Term. Of course, therefore, we do not state the above solution as the only one. We simply hold now that, in any view of the later statute, the Act of 1874 may, without interfering with its operation, be applied when only one term of the Circuit Court is held at the same time.

The motion to remand is overruled.

WOODS AND FAY

vs.

DICKINSON.

1. Where a solicitor has entered an unauthorized general appearance for the defendant and afterwards a decree *pro confesso* is taken for want of an answer, the defendant may, by motion and a special appearance for that purpose only, have the general appearance stricken out and the decree *pro confesso* vacated.
2. An order of the court below, refusing to extend the time for taking testimony, is not appealable.
3. It seems that when a special appearance is entered for the purpose of having an unauthorized general appearance stricken out on motion, the court cannot order a commission to issue to take testimony for the purpose of ascertaining whether the general appearance was authorized; such an order presupposes the entry of a general appearance, and assumes the very point in issue.
4. An appearance by counsel, who, it is alleged, had no authority to waive process and defend a suit may be explained; such an appearance, unless authorized, does not bind the party appeared for, and a judgment or decree rendered in consequence of it is a nullity. Such want of authority may be proved by the attorney himself.
5. The fact that a notice of motion and a copy of the proposed motion had been served upon plaintiff's counsel, does not, unless the motion has been actually filed in court, constitute such an appearance as waives the necessity for process when it appears that the proposed motion was abandoned and never acted upon.
6. A mere agreement to pay out of a particular fund is not sufficient to establish an equitable lien. There must be an appropriation of the fund *pro tanto*, either by giving an order or by otherwise transferring it in such a manner that the holder of the fund will be authorized to pay the amount directly to the creditor without the further intervention of the debtor.
7. An assignment by a client to his attorney of a portion of a claim against the United States, which claim the attorney is engaged in prosecuting, comes within the mischief and the letter of the Act of Congress of 1853, prohibiting assignment of claims against the United States.

In Equity. No. 11,374. Decided June 26, 1889.
Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL from a decree of the Special Term dismissing a bill for an injunction.

THE FACTS are stated in the opinion.

Mr. SAMUEL SHELLABARGER for complainants.

Mr. W. D. DAVIDGE for defendant.

Mr. Justice HAGNER delivered the opinion of the Court :

The complainants, who are solicitors of this court, filed their bill averring that they were employed to prosecute a claim in behalf of the defendant Dickinson, against the United States, first, before the Court of Claims, and afterwards before a committee of Congress, and that through their efforts in great part the sum of \$96,000 was finally appropriated by Congress to pay the amount found to be due to the claimant; that as his counsel they applied to the Treasury authorities and received a draft payable to the defendant, for this large sum of money; that they informed Dickinson they had the draft in their possession, and claimed a lien on it for their fees, but said they would be prepared to hand it over to him when he should pay the fees which they claimed to be due. In another part of their bill it is practically admitted that Dickinson on his part offered to pay their fees as soon as they should send him the draft; that they had reason to fear he might obtain from the authorities a duplicate draft and draw the money, and thus deprive them of what they thought to be their established lien upon the fund, and they ask that an injunction be granted by the court to enjoin this action on the part of this defendant, and to prevent any interference to the prejudice of their rights.

A restraining order was issued by the justice holding the chancery term; and various other proceedings were taken which are made the subject of litigation before this court. The defendant is a non-resident, and there had been no service of process upon him; but some time after the filing of the bill, Mr. Brown, a solicitor of the court, entered his appearance for the defendant. It was alleged, on behalf of Dickinson, that Brown had no employment whatever to appear in the case, but happened to be present in the clerk's office, when some friends of Dickinson applied to the clerk to see the papers and the restraining order, which they understood had been passed, but the clerk declined to let

the papers go into the hands of anybody but the counsel of Dickinson; whereupon Brown, for the sole purpose of obliging Dickinson's friends and relieving the clerk of all embarrassment, directed him to enter his appearance and give his receipt for the papers as counsel of Dickinson. As soon as Dickinson heard of this he disclaimed any authority on the part of Brown to act as his solicitor; and it was conceded by Brown that the facts were as I have just stated them.

The first contention of complainants is that the justice below erred in passing an order on the 31st of December, 1888, striking out the appearance of Brown, which, under the circumstances stated, had been entered generally for the defendant on the 3d of October, 1888, and in vacating the decree *pro confesso* passed after such appearance; and also in refusing to order a commission to take the testimony of a witness named by them, bearing upon the question of the authority of Brown to enter his appearance. In considering these points we are not to be understood as assenting to the proposition of the complainant, that upon an appeal to the General Term we are bound to consider the merits of an interlocutory order previously passed in the cause, and which had not at the time been appealed from. We declined to pursue this course in the recent case of Robeson vs. Niles. The order vacating the decree *pro confesso* might perhaps have been considered as one affecting the merits of the cause or proceeding, and if so would have furnished an occasion for an appeal at the time; but the refusal of the justice below, on the 3d of December, to extend the time to the complainant to take testimony upon the point indicated, which had been previously limited to the 7th day of December, was plainly a matter of discretion, and not reviewable. Among other reasons why the justice was right in refusing to pass the order to take testimony at that time, is the consideration that the issuing of a commission to take testimony presupposes that the party against whom it is to operate had already entered an appearance, and it might,

therefore, have been an assumption of the very point which the plaintiff was then trying to establish.

The propriety of the order of the justice striking out the appearance is to some extent involved in the inquiry whether up to that time the defendant had authorized a general appearance to be entered in his behalf.

If Brown was authorized to enter such an appearance on the the 3d of October, then it ought not to have been stricken out. If he was not so authorized, then clearly his name should have been removed from the docket. The argument of the complainants upon the question of power and the rightfulness of its exercises, under the circumstances of the case, is fully met by the decision of the Supreme Court in the case of *Shelton vs. Tiffin*, 6 Howard, 186, where it was held that the appearance by counsel who, it is alleged, had no authority to waive process and defend a suit, may be explained; that such an appearance, unless authorized, does not bind a party appeared for; that a judgment or decree rendered in consequence of such an appearance is a nullity, and that such want of authority may be proved by the attorney himself.

It is next insisted that the notice served upon the plaintiff's counsel by Mr. Davidge, with a copy of his proposed motion, constituted in fact a general appearance for the defendant and justified the subsequent motion of the plaintiff, on the 25th day of January, 1889, that the court should enter a rule against defendant to plead, answer or demur to the bill within ten days. The notice of Mr. Davidge stating that he appears in the cause not generally but only for the special purpose of his motion, gives notice that on the 7th of January, 1889, he will file a motion to set aside the restraining order and vacate the preliminary injunction upon the grounds: First, that the court had no jurisdiction to make such order; second, that the case made by the bill is not one in which said order could be made; third, that the complainants have no such lien on the draft or on the fund

appropriated by Congress for the payment of their alleged claim for counsel fees as would entitle them to the relief claimed.

The complainant's counsel, after they were served with this notice, assumed that it amounted to the actual filing of the indicated motion by counsel for defendant, and thereupon moved that the defendant should be required to plead or answer, and that testimony should be taken in their behalf.

It is conceded that Mr. Davidge never filed his proposed motion, and avowed his determination not to do so, as soon as the motion of complainants' counsel was brought to his attention; and his proposed motion appears in the record in no other way, except as it was embodied in the motion of complainants' counsel.

If Mr. Davidge had actually presented the motion to the court, the contention of the complainants' solicitor would have had the support of very respectable authorities; for the notice stated it would be based not only upon the ground that the court below was without authority to grant the restraining order, but also upon the alleged want of equity in the bill. *Jones vs. Andrews*, 10 Wall., 332; *Elliott vs. Lawrence*, 43 Ohio, 177. But this is not the predicament of the matter before us, and we cannot agree that the proposed intention of counsel, abandoned and never acted upon, can be the equivalent of a deliberate waiver by the defendant of his legal privilege to be impleaded at the place of his domicile.

Neither Mr. Davidge's appearance for the special purposes of the notice, to strike out Brown's appearance, nor his participation in the argument below or in this court, could constitute a general appearance for the defendant. The cases cited by the complainants show that a special appearance may be made without such compromising effect upon the defendant's immunities as a non-resident as are insisted upon.

We are next to consider the propriety of the order of the justice below, of the 31st of December, 1888, overruling the motion of the complainant's solicitor to compel the defendant to plead, demur or answer by a day certain. As this was predicated only of the idea of the equivalent of a general appearance for the defendant by Mr. Davidge, it necessarily follows with our decision* that this predicate is unfounded.

The main question in the case is whether the complainants have presented such a case as should upon their own showing entitle them to the injunction prayed for, to prohibit the defendant from asking for or receiving from the Treasury authorities a duplicate draft in payment of the appropriation, or otherwise imperiling or destroying the complainant's lien upon the original draft.

In a proper case courts of equity would grant such relief, for as the part of the fund transferred by the proper assignment no longer belongs to the party about to receive it, he ought not to be allowed to carry off the entire fund, including the part so assigned which is the property of another. The decision of the highest courts have repeatedly explained the character of the lien or equitable assignment which they will thus protect.

The Supreme Court, in *Wright vs. Ellison*, 1 Wall., 16, in deciding that the facts there were insufficient to establish such an assignment or lien, says: "The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his right at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury." "The matter seems to have been left to rest upon the principle of *quantum meruit*, to be settled by the agreement of the parties when the business was brought to a close. The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include this case. It is indispensable to a lien thus created that there should

be a distinct appropriation of the fund by the debtor and an agreement that the creditor is to be paid out of it."

Similar language is used in *Trist vs. Childs*, 21 Wall., 447: "It is well settled that an order to pay a debt out of a particular fund belonging to the debtor, gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order and the payee may enforce the payment of the amount against the drawee. But a mere agreement to pay out of such a fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor." *Poter vs. White*, 127 U. S., 266.

Do the averments of this bill disclose such a lien or assignment? We are not considering here whether they have an attorney's lien upon this warrant, for that would not satisfy them. Under such a lien they would have a right to hold the warrant, and in any way they could realize the fees which they are entitled to as attorneys by means of that possession. But the question relates to their possession of such an equitable lien or assignment as is recognized in the above cases. We think the bill shows no such state of facts. It states in the first place their employment; that they became "dissatisfied with the unsatisfactory character of their employment, although their services up to that time had been performed with the full knowledge and acquiescence, and upon consultation and in co-operation with the defendant." Thereupon they wrote to the defendant, advising him of their dissatisfaction, "and informing him that they desired their employment and compensation to be directly with him, and that the usual compensation for the successful management of such cases, based upon an entirely contingent fee, was a sum equal to from 25 to 33 per centum

of the amount recovered, and advised the defendant that such was the compensation that complainants should expect should he desire complainants to continue in charge of the case;" "that the defendant not dissenting to the fee earnestly expressed his entire confidence in the skill and ability of the complainants, and insisted upon the continuation of their services, and asserting to complainants that he would pay a liberal fee therefor." They file the correspondence between Mr. Fay and Mr. Dickinson. Mr. Dickinson, in his letter in February, 1886, says: "I have no desire for you to retire from the case. You know very well and understand its merits. I have entire confidence in your proper presentation of it to the court, and I believe the court will do me justice. Too much publicity has already been given to the case, which I fear may be injurious. I will try soon to get it out of the present wrangle, if possible. As you have been to some trouble and expense in procuring testimony, I herewith enclose my draft on Messrs. P. Van Volkenburgh & Company for \$200, which please acknowledge." That seems to be the extent of the acquiescence or promise on his part alluded to in the bill.

How does this state anything amounting to an assignment of the draft or of the fund or any part of it? It does not even constitute a contract which any court of law could enforce. The complainant asserted that in similar cases 25 or 33 per cent. is a fair fee, and that they would expect such in this case. Now, what is "from 25 to 33 per cent.?" Is it 26 per cent. or $27\frac{1}{2}$ per cent., or any of the intermediate sums or fractions between the amounts named? Where is there any agreement on the part of this defendant to pay any definite sum? The bill sets forth the facts most favorably for the complainants, and the extent of any engagement by the defendant is the statement that he would pay them a "liberal fee."

It may be he thought 10 per cent. of the amount recovered would be a liberal fee, and above all there is not the

slightest pledge by the defendant that whatever he is to pay was to come out of this fund. On the contrary, the letter filed shows that the only fee he ever paid the complainant, so far as appears in the case, came out of his own pocket before the claim had been received by him or even allowed by the authorities. It is, therefore, utterly out of the question, upon their own showing, to find any such lien or equitable assignment.

The complainants next insist that the justice was wrong when, in the concluding part of this order of the 7th day of February, 1889, he refused to allow an order of publication to be issued against the defendant as a non-resident. Of course this application was entirely at variance with the previous contention that there had been an appearance in the cause by Mr. Brown or Mr. Davidge. But was the court right in refusing to issue the order of publication? Here its attention was directly called to the pretention that the bill did sufficiently disclose an equitable lien in favor of the complainants, and challenged as he thereby was to issue that order, its passage, under the circumstance in which the case then stood, would have been a direct indorsement by the justice that the bill disclosed an equity sufficient to support the relief prayed for.

It is urged that Section 808, R. S. D. C., provides that the proceeding to enforce any lien shall be by bill or petition in equity; and that by Section 787 publication may be substituted for notice upon a defendant, who cannot be found, in proceedings to enforce any lien, &c., and hence that the justice should have passed the order.

But the latter section applies only where the court sees there is a lien, and certainly not to a case where the court sees no such lien is disclosed.

There is another objection which is fatal to the plaintiffs' claim, and which shows they had no standing here, either to obtain the relief prayed for, or as ancillary to that relief, to require the court to issue the order of publication. We

refer to the Act of 1853, February 26, which provides that the transfer or assignment of any claim against the United States, or of any part thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or authority for receiving payment for such claim, or of any part or share thereof, shall be absolutely null and void, unless freely made and executed in the presence of at least two attesting witnesses, after the allowance of said claim, the ascertainment of the amount due, and the issuing of a warrant for its payment. No such assignment is claimed to have been made in this case.

It is insisted that this particular case is not within the terms of the Act of 1853, since it is not within the mischief of the law. But we think it too clear for argument that the present claim is entirely within the mischief as it is within the words of the law.

The decree below is affirmed.

REUBEN H. ANDREWS

vs.

JOHN R. HUNT, TRUSTEE, AND REGINALD FENDALL,
ADMINISTRATOR OF GILBERT M. WIGHT.

1. The provision of Section 858, R. S. U. S., excluding parties in a suit by or against personal representatives from testifying as to any transaction with or statement by the testator or intestate, does not inhibit a party from testifying that an alleged transaction *never* took place between him and the intestate. The application of the statute is to be strictly limited to the cases covered by the proviso.
2. Nor does the statute apply to transactions with the *agents* of the deceased.
3. Where, in a suit against an administrator to cause him to deliver up certain notes found by him among his intestate's effects and apparently the property of the intestate, but which, in fact, had been left with the latter by the plaintiff for safe-keeping over five years previous to his death and been overlooked, it was adjudged that as the laches of the plaintiff and his lack of business method had caused the suit he should be decreed to pay the costs although upon the main question he was entitled to prevail.

In Equity. No. 11,511. Decided June 26, 1899.

Justices HAGNER, JAMES and MONTGOMERY sitting.

APPEAL by defendants from a decree of the special term on a bill filed to procure the release of a deed of trust and the surrender of the notes secured thereby.

STATEMENT OF THE CASE.

The bill alleged that in the year 1878 Andrews executed and acknowledged a deed to the defendant, Hunt, as trustee, conveying a lot in Washington City, purporting to secure the payment of four promissory notes, each for \$1,000, payable to Gilbert M. Wight, at twelve, eighteen, twenty-four and thirty months after date, respectively; that these notes were not made because of any indebtedness on his part to Wight; that they were never delivered to Wight and never became his property, nor was the deed of trust ever delivered to the grantee, Hunt; that it was never understood between

the complainant and Wight that the notes and deed of trust should be delivered to him or should become his property; that the notes were made with the view of their negotiation when the plaintiff might desire and should be able to secure a loan thereon; that the eighteen months' note was afterwards discounted and negotiated by the plaintiff, the said Wight indorsing the same, and the proceeds thereof were paid to the complainant who lent \$500 of the amount to Wight, and took his receipt therefor.

That the complainant was then and now is a clerk in the United States Treasury, and afterwards paid that note by orders on his salary, and he files with his bill the note and Wight's receipt for the \$500; that the deed of trust and the three notes were inclosed by the complainant in an envelope marked with his name, and were handed to Mr. Donn, Wight's clerk, to be kept in his safe as the complainant's property; that Wight lived a number of years after the deposit of the papers with his clerk, and never used or claimed the notes or made any claim against the complainant in respect thereof, and never caused the deed of trust to be recorded; that after the death of Wight the defendant, Fendall, his administrator, found the papers in his safe and placed the deed on record, and now holds the notes and declines to surrender them or release the deed, and Hunt, the grantee, also declines to execute such release without the authority of Fendall.

The complainant alleges that the recorded deed creates an apparent lien on the land thereby conveyed, casts a cloud on his title and interferes with his disposition of the same; and he prays that Hunt may be decreed to execute a release of the deed, and Fendall, the administrator, may be directed to deliver up the three notes; and for further relief.

Fendall, in his answer states that Wight died in 1884, and he was appointed his administrator; that he found the

three notes and the deed among the papers of his intestate, in his private safe, together with a duplicate of the eighteen month's note; and being without any notice or information that the notes did not belong to Wight's estate, he placed the deed on record, supposing it had been left unrecorded by mistake. That he knew there had been numerous pecuniary transactions between Wight and the complainant; that at the date of the notes and deed of trust, he finds from the books of the deceased the complainant made large purchases of merchandise from Wight, who was a furniture dealer; that he wrote to the complainant, after recording the deed, and demanded payment of the note, and was informed by him that the note had been settled by dealings between him and Wight. That he has made efforts to ascertain the true state of the accounts between the complainant and the estate but without success, but he is led to the belief that the complainant is indebted to the estate in a considerable amount of money, although he has no personal knowledge of the matter; and he denies that the complainant is entitled to the relief claimed.

The trustee in his answer disclaims all knowledge of the allegations of the bill, and submits his rights to the court.

The justice holding the Equity Court decreed that the trustee should execute the release as prayed in the bill, and that Fendall, the administrator, should deliver up the notes to be cancelled, and should pay the costs of the suit *de bonis testatoris*.

From this decree the administrator appealed to this court.

Messrs. W. E. EDMONSTON and S. T. THOMAS for complainant:

The handing of the deed of trust and notes in question to Donn, to be placed in Wight's safe until the complainant should call for them, was not a "transaction" with Wight. At most it could only be said to have been a "transaction" with Donn as Wight's agent.

In this view of the case it was perfectly proper for Andrews to testify.

In New York, under a similar evidence act, it has been repeatedly held that the prohibition that neither party to a suit by or against executors and administrators shall be allowed to testify against the other as to any transaction with, or statement by, the testator or intestate, does not extend to "transactions" with the agent of the deceased person, or with the deceased agent of the adverse party. *Pratt vs. Elkins*, 80 N. Y., 198; *Platner vs. Platner*, 78 *Id.*, 90; *Kerr vs. McGuire*, 28 *Id.*, 446; *Wadsworth, admr., vs. Heermans*, 85 *Id.*, 639; (S. C. sub. nom. *Hill vs. Heermans*, 22 Hun., 455); see generally 1 Whart. on Ev., Sec. 469.

The Supreme Court has carefully restricted Section 858, Revised Statutes, to cases where judgment may be rendered for or against an administrator, executor or guardian. *Potter vs. National Bank*, 102 U. S., 164. See, also, the recent case of *Droop vs. Metzertott* in this court. *Ante*, 89.

Messrs. EDWARDS & BARNARD for the defendants.

Mr. Justice HAGNER, after making the foregoing statement of the case, delivered the opinion of the Court:

The proof discloses a very remarkable state of facts. Wight lived five years and five months after the execution of the deed of trust; and yet there is nothing to show that he ever claimed any ownership over the notes or the deed, or demanded payment of the sum apparently due; notwithstanding that during this time he was considerably embarrassed in his affairs, and was a frequent borrower of money, among others from Andrews; from a cook at a hotel, and from Government clerks and ladies. The only evidence of his ownership of the notes is that afforded by their recital, and by his possession of the papers.

Several witnesses were examined in behalf of the complainant, among others Andrews himself. Before considering the testimony, it is proper to dispose of a preliminary objection to the evidence of the complainant.

It is insisted upon the part of Fendall that Andrews is not a competent witness under Section 858 of the Revised

Statutes of the United States, which declares: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action, because he is a party to or interested in the issue tried: *Provided*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify by the court."

Does the testimony of Andrews come within this inhibition?

Under this section the disqualification of the witness is limited to testimony against the other party "as to any transaction with or statement by the testator, or intestate," etc.

But so far as the statement of Andrews can be said to refer in any way to transactions with Wight, it is confined to a *denial* that any such transaction *between them* ever took place. He testified that he never delivered the papers to Wight, but stated nothing whatever as to any conversation with the deceased on the subject of the deed and notes.

The New York Code of Civil Procedure, Sec. 829 (which goes much further than our statute), prohibits the survivor from testifying that any particular communication or transaction did *or did not* take place between him and the deceased. Rapalje, on the Law of Witnesses, page 213, says: "So long as the survivor refrains from testifying as to anything that passed or did not pass personally between himself and the deceased it is no valid objection to his testimony that the facts which he states bear upon the issue whether or not the personal transaction in question took place, or upon the truth of the testimony by which such transaction is sought to be proved against him."

This was the ruling in Wadsworth vs. Heermans, 85 N. Y., 639, which was an action of replevin brought by Hill, the plaintiff's intestate, to recover negotiable bonds which

he claimed to have deposited with (Fellows) the deceased, for safekeeping merely, but which were found in the deceased's safe with his name inserted in the blanks, and were claimed by the defendant as assignee of the deceased. Hill was asked whether Fellows' name was on the bonds when he (Hill) put them in the safe. This question was objected to as involving a personal transaction with the deceased, but the Court of Appeals affirmed the decision of the trial court overruling the objection, on the ground that the question involved no personal transaction, but merely respected the condition of the bonds at a particular time.

So in *Pinney vs. Orth*, 88 N. Y., 447, under the same statute, it was held that a party was not precluded from testifying to extraneous facts which tended to show that a witness who had testified to a conversation between that party and the deceased, must have testified falsely because the witness was not present at the interview described.

It is well settled that the New York statute prohibiting a party to a suit by or against executors or administrators from testifying against the other, or to transactions with the deceased, does not extend to transactions *with the agents* of the deceased. *Pratt vs. Elkins*, 80 N. Y., 198. The statement of Andrews, therefore, as to his interview with Donn, when the papers were deposited in Wight's safe, would clearly have been admitted, in that State; and the United States statute is not more stringent than that of New York in this particular. The Supreme Court in the recent case of *Goodman vs. Fox*, 129 U. S., 631, limited the application of the statute with strictness to cases covered by the proviso; and such have been the rulings of this court.

For these reasons, we think, the evidence of Andrews was properly admissible.

The testimony of the witnesses on both sides is substantially as follows:

Andrews, the complainant, testified in his own behalf that he has been a clerk in the United States Treasury De-

partment continuously since March, 1864; that he first became acquainted with Wight in 1866; that he bought some furniture from him in 1874; that Wight accommodated him in the matter of the furniture and let him pay for it as he could; that the four notes were originally secured by a chattel deed of trust, bearing the same date as the notes, on the furniture in his house; that the furniture covered by the chattel trust was afterward sold at auction, but not under the power contained in the deed, and the proceeds turned over by the auctioneer to Wight, who gave all except about \$100 to him (Andrews); that thereupon, in order to make the security good as to the eighteen months' note, which he had negotiated with one Hobbs in April, 1877, he (Andrews), took the remaining three notes and a duplicate of the one transferred to Hobbs to the office of Mr. Carusi, who had prepared the chattel trust, and requested that gentleman to prepare a deed of trust upon his (Andrews) real estate securing the same notes; that as soon as Carusi had prepared the deed of trust upon the realty he signed and acknowledged the same and took it and the notes away with him and went across the street to Wight's place of business, intending to put them in Wight's safe; that he called the attention of Donn, Wight's clerk and salesman, to the papers, telling him he wanted him to particularly notice them because they were his private papers, so that in case of Wight's death they could be returned to him; that thereupon he (Andrews) placed the papers in an envelope, sealed it, wrote his name upon it, and handed the package to Donn to put in the safe.

Mr. Donn, called for the complainant, testified that he was in Wight's employ for twenty-seven years. He recollected the circumstance of Andrews asking him to put some papers in Wight's safe; he saw the papers, recollects that Andrews put them in an envelope, sealed it, and wrote his name upon it, and that he (Donn) put them in the safe. He was very busy with a customer when Andrews called,

and does not recollect whether he made any explanation about the papers, but does remember Andrews saying he had just come from Mr. Carusi's office. Wight had told the witness that Andrews was at liberty to use the safe for the deposit of his papers whenever he chose to do so.

The complainant further testified that a short time after Mr. Fendall was appointed administrator of Wight's estate he received a circular letter from him, stating he was indebted to Wight's estate in about \$2,500, but not mentioning the notes in question, and inviting him to call and see about the matter; that as a result of this letter he called at Mr. Fendall's office, but did not see him, but did see Mr. Coughlan, his associate; that he had several interviews with Coughlan concerning the matter; that about the third interview, when the deed of trust and notes in question were produced by Coughlan, he at once claimed them as his property, and told Coughlan the circumstances under which they were put in Wight's safe, but Coughlan said he could not give them up and that he (Andrews) would have to see Mr. Fendall about the matter.

Mr. Fendall, the administrator, testified, on his own offer, that he had a conversation with Andrews in which the latter claimed the notes had been settled by other dealings between himself and Wight; but not being able to come to that conclusion he turned the whole matter over to Coughlan, his associate.

Coughlan, called for the administrator, stated that he did not remember whether Andrews saw Fendall or not, but does recollect that when he showed Andrews the deed of trust and notes in question, the latter claimed them as his property, and made substantially the same statement about placing them in Wight's safe that he gave in his testimony in this cause.

Upon the whole testimony we entertain no doubt the decree below should be affirmed. Apart from the direct testimony, the circumstances surrounding this transaction

strongly support the contention of the complainant. Wight died in straightened circumstances, and his estate was absolutely insolvent. During all the intervening five years these papers were in his safe. It is difficult to understand why he did not use them if he had the right to do so. He certainly needed \$4,000 very badly. But so far from claiming the right to use all the notes, out of the proceeds of the note that was discounted he borrowed \$500 from Andrews, which he testifies he loaned Wight only out of good fellowship. After this, the three other notes, amounting to \$3,000, remained in his possession unused, although there was no reason he should not have applied them to relieve his needs, if he had the right to do so. We think this conduct on his part was utterly irreconcilable with the idea that he was the owner of the notes.

The decree required the administrator to pay the costs *de bonis testatoris*. We see no reason why this should be so. Andrews certainly was guilty of laches in leaving his affairs in such confusion, and it was his own lack of business method that caused the expenses of this suit; and we adjudge that he should pay the costs. With that exception the decree below is affirmed.

JAMES GIBBONS

vs.

DAVID DULEY ET AL.

1. The Maryland Act of 1715, providing that no bond shall be admitted in evidence against any person after twelve years, &c., does not prohibit the admission of such a bond in evidence in collateral controversies.
2. Where a deed executed in pursuance of a bond to convey is uncertain on its face, resort may be had to the bond for the purpose of ascertaining the meaning of the deed.
3. Courts of equity discourage a stale demand when the person setting it up has lost his moral right to enforce it.
4. A court of equity will interpose to remove a cloud upon the title to real estate, where such a cloud has existed so long, as by the record it is questionable if the title of the defendant is not *prima facie* better than the complainant's.
5. Where on a bill to remove a cloud upon title to real estate it does not appear that the defendant ever laid claim to any interest in the premises, the court, while it will remove the cloud, will impose the costs upon the complainant.

In Equity. No. 10,248. Decided June 25, 1899.

Justices HAGNER, JAMES and MONTGOMERY sitting.

BILL to quiet title. Certified to the General Term for hearing in the first instance.

THE FACTS are sufficiently stated in the opinion.

MESSRS. IRVING WILLIAMSON and M. F. MORRIS for complainant:

"The object of the legislature in the enactment of this section [Md. Act 1715, Ch. 23, Sec. 6] was not to prohibit the giving in evidence of a bill or bond in every case where it might be above twelve years' standing, or in any case where it was not itself the foundation of the action." *Lamar vs. Munro*, 10 G. & J., 50.

It is submitted that the bond is properly in evidence, without proof of execution, by reason of the fact that it is an ancient document, and was found in the place and under the circumstances set forth in the evidence. *Stoddard vs.*

Chambers, 2 How., 284; Burr vs. Gatz, 4 Wheat., 213; Winn vs. Patterson, 9 Peters, 663; Applegate vs. Mining Co., 117 U. S., 255.

A deed is to be construed against the grantor and favorably to the grantee. Charles River Bridge vs. Warren Bridge, 1 Peters, 589.

A deed is to be construed in all its parts with reference to the actual state of the property at the time of the conveyance. Commonwealth vs. Roxbury, 9 Gray, 493.

And the intentions of the parties are to be ascertained not only by the language of the deed itself, but by reference to extrinsic facts, which may consist of contemporaneous writings relating to the same subject, or prior deeds, through which the title has come down, and writings contemporaneous therewith, and circumstances relating to the premises. Lane vs. Thompson, 43 N. H., 320.

Messrs. A. A. LIPSCOMB and GUION MILLER for defendant:

The bond of William and Jonathan Duley cannot be considered, because it was objected to, and is therefore excluded by the express terms of the Statute of Limitation of Maryland of 1715, in force in the District, which provides that "No bond * * * shall be good and pleadable or admitted in evidence" after twelve years. Thompson's Digest, Sec. 5, 299.

The deed from William Duley to Smith was intended to convey, and did convey, only the one-tenth interest "*which descended to William Duley as one of the children and heirs-at-law of Henry Duley, who died intestate.*"

The covenant shows conclusively that the intention was to convey only "*one child's part, that is, one-tenth part.*"

And when the intention thus appears in a subsequent clause and covenant, it limits the grant, even though there be a prior clause which, if not thus limited, would be sufficient to convey a greater interest. Brown vs. Jackson, 3 Wheat., 449; Mims vs. Armstrong, 31 Md., 87.

And the description in the deed cannot be controlled by the declarations of the parties, or by proof of negotiations, or agreements on which the deed was executed. *Parker vs. Kane*, 22 How., 19.

The intention of the parties to a deed is to be deduced from the instrument of conveyance, as in the case of any other contract. *Martindale on Conveyancing*, Sec. 90, 78; *Long vs. Wagoner*, 47 Mo., 180; 3 Washb. on Real Prop., *639, p. 431, (4th ed.); *Allen vs. Holton*, 20 Pick., 463-4.

The intention is to be gathered from *the whole instrument*. 3 Washb. on Real Prop., 431, (4th Ed.); *Martindale on Conveyancing*, Sec. 95.

And the rule that a deed is to be construed against the grantor is of little value, and the last to be resorted to, *Martindale on Conveyancing*, Sec. 99; *Adams vs. Warner*. 23 Vt., 411, 412.

Smith was a tenant in common with *William Duley*, and therefore could not acquire title by adverse possession without ouster and actual notice to his co-tenant of his adverse claim.

Possession of a tenant in common is presumed to be for the benefit of his co-tenants. *Newell vs. Woodruff*, 30 Conn., 497, 498; *Warfield vs. Lindell*, 38 Mo., 581; *Forward vs. Deitz*, 32 Pa. St., 73-4.

Mere quiet possession by one tenant in common will not constitute such an adverse possession as to defeat the title of his co-tenant. The co-tenant must have actual notice of the adverse claim, and a recorded deed from the tenant of the whole property does not constitute notice. *McClung vs. Ross*, 5 Wheat., 124; *Shumway vs. Holbrook*, 1 Pick., 114; *Holley vs. Hawley*, 39 Vt., 532; *Chandler vs. Ricker*, 49 Vt., 128; *Campbell vs. Campbell*, 14 N. H., 483; 3 Washb. Real Prop., *592.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

In this cause the bill was filed to quiet title to "two parts

of a tract" of land aggregating nearly sixty-six acres. The defendants appeared and answered. Testimony was taken and the cause is certified here for hearing on pleadings and proofs.

The material facts are substantially as follows: At some time shortly prior to 1802 one Henry Duley died seized of some real estate situated in the District of Columbia and known as "Turkey Thicket," comprising about one hundred and sixty acres, and including the parcels in controversy here. Duley left surviving six sons, Jonathan, William, Joseph, John, Hezekiah and Zadoc, and four daughters; Sarah, who died intestate shortly after the death of her father, leaving children, and Ann, Eleanor and Sophia. On the first day of July, 1802, William bargained with his sister Eleanor for her interest in the estate, paid her in full, took her receipt and the bond of her husband, conditioned that she should convey to him on or before January 1st next thereafter. On the 3d day of May, 1804, Jonathan and William executed to Samuel Harrison Smith their joint and several bond in the sum of \$3,200, reciting that they had "agreed to bargain and sell" to Mr. Smith the entire parcel at \$10 per acre; that he had paid \$800 cash and was to pay the balance in one year, upon payment of which they were to convey or "cause to be conveyed" said premises. Mr. Smith went into immediate possession of the entire purchase, and afterwards, and in due time, Joseph, Zadoc, Jonathan, John, Hezekiah, and Ann, and the heirs of Sarah, deeded their respective interests direct to Mr. Smith. On the 12th day of February, 1805, Sophia deeded her interest to William, which deed was recorded in the following October. On the 6th day of the next November, Eleanor, as she had previously and on the first day of July, 1802, agreed, executed to William a deed of her interest, which deed, because of some alleged defect in the acknowledgment and delay in its delivery, was supposed by all concerned to be invalid and was never recorded. On the first

day of October, 1807, Sophia executed to Mr. Smith a deed describing and purporting to convey the same interest which she had theretofore deeded to William. On the 28th day of November, 1807, William executed and delivered to Mr. Smith a deed by which he granted, bargained, transferred, &c., "all the estate, right, title, interest, property and claim" which he had "in and to two * * * parcels of land designated and known by the name of 'Turkey Thicket' * * * descended to the said William Duley (among others) as one of the children and heirs at law of Henry Duley, deceased," covenanting that "said William Duley * * * has full * * * power * * * to sell and convey one child's part, that is, one-tenth part, of * * * said tracts or parcels of land," and to "warrant and defend the same premises to the said Smith, &c."

Smith continued in possession of these lands, and others, which constituted his homestead from the time of his contract with Jonathan and William until January 1, 1839, when he sold and deeded the entire property, and the title so conveyed by Mr. Smith has, through mesne conveyances, vested in the complainant, who, as it is alleged, and as is probably true, "paid full value for the whole title, supposing that he acquired the same." Immediately upon his purchase complainant took possession and has ever since been, and still is, "in full possession thereof." The bill avers that by reason of the language of the covenants in the deed from William Duley to Mr. Smith, and because of the failure to record the deed from Eleanor to William, "the paper and record title of complainant is apparently limited to eight undivided tenths," which "record defects create a cloud on complainant's title;" that the defendants constitute "all of the heirs and decedents" of William Duley. The bill prays for a decree declaring complainant "vested * * * with all the right, title, interest, and estate of the defendants * * * as the heirs at law * * * of William Duley," and that "a trustee may be appointed to convey

all the interest of said defendants to complainant in fee simple. No question is made but that William Duley is dead, and that the defendants constitute his sole and only heirs at law. The defendants, however, say that the entire purchase price was never really paid by Mr. Smith, and they call attention to the fact that in a bill in equity which he filed in 1824 against William Duley, Eleanor, and her husband, asking that they be "decreed to convey and assure the remaining tenth"—the share of Eleanor—to him, he admitted that \$74 of such price was then unpaid. They insist that the deed from William Duley to Smith cannot reasonably be construed as being *intended* to convey, or as *conveying* more than a tenth interest, and that, therefore, inasmuch as William, when he executed the deed, actually owned the three-tenths, the shares of Eleanor and Sophia, respectively, as well as his own share, he died owning the remaining two-tenths, which two-tenths had descended to defendants. They urge that the bond executed by Jonathan and William was not admissible in evidence, because it could not be allowed to affect the construction of William's deed, and because the statute of Maryland of 1715 provides "that no bonds * * * shall be * * * admitted in evidence against any person * * * after twelve years," &c. Thompson's Digest, 289, par. 5. And, lastly, they say, that if the deed from William to Smith did, on its face, purport to convey the three-tenths interest which he owned, then, as a matter of fact, the title of complainant is unclouded, and there would be "nothing for a court of equity to remedy, and the bill should be dismissed."

It is true that Mr. Smith in the old (1824) chancery bill did aver that \$74 of the purchase price, which he had agreed to pay Jonathan and William for this property, was still unpaid. We are not only unable to find any evidence in the record indicating its subsequent payment, but it seems probable that the same has never been paid. Passing this question for the present, what construction shall be

given to the deed executed November 28, 1807, by William Duley to Mr. Smith, and, first, was the bond admissible in evidence?

The Maryland statute has no application to a case like this. If such a bond was sought to be enforced against the maker or any right or duty or obligation under it was being litigated, that would be quite another matter. The statute was manifestly not intended to prohibit its use as evidence in all proper collateral ways. "The object of the legislature * * * was not to prohibit the giving in evidence of a * * * bond * * * where it might be above twelve years' standing, or in any case where it was not itself the foundation of the action." *Lamar vs. Manro*, 10 G. & J., 50. Should this bond be considered as bearing on the question of the construction of this deed and in determining the equitable rights of the parties? We think it may. "In construing a deed, the court places itself, as nearly as possible, in the situation of the contracting parties." 3 Washburn on Real Property, 384. The bond could not of course be considered for the mere purpose of construing a deed which was plain and unambiguous. But here is a deed which on its face is at least uncertain. It is plausibly contended on the one hand that fairly construed it intends to convey the whole of the grantor's interest in the property; and on the other hand, that the words which follow the grant read with the words of the grant indicate a different intent. We think there can be no doubt that for the purpose of ascertaining the intent of the parties to the deed the whole text of the instrument should be examined and every part considered. *Paddock vs. Pardee*, 1 Mich., 425. And for the same purpose as well as to assist us in determining the real equities of this controversy, the condition and situation of the parties, as well as other collateral facts, may be proven and considered. 3 Washb. on Real Prop., 384; 1 Mich., 425; *Story vs. Benedict*, 5 Conn., 220; *Wilson vs. Troup*, 2 Cow., 228.

"Parol evidence may be resorted to in explanation of and to explain latent ambiguities." Martindale's Law of Conveyancing, par. 88. "References may be made to contemporaneous writings and prior deeds." *Id.*, 92.

The defendants insist, however, that as matter of fact, William Duley did not *intend* by his deed to convey more than the undivided one-tenth. They exhibit the deeds made by the brothers and sisters of William, and invite attention to the fact that the consideration recited as well as the language of the grants and covenants and the descriptions in each are substantially if not identically the same as in the deed of William. They urge that neither he nor Mr. Smith understood that he was conveying more than his own inherited interest. They argue that whatever may have been the real situation, neither of the parties supposed that William, when he executed his deed, owned either of the shares of Eleanor or Sophia. They call attention to the fact that in October, 1807, Sophia deeded direct to Smith, who, seventeen years later, filed his bill in equity to compel Eleanor to convey to him, and so they say that manifestly neither William nor Mr. Smith supposed that William had more than a tenth interest, and they submit that it must, therefore, follow that William could not have intended to convey and Mr. Smith could not have supposed that he was then receiving the interest of either Eleanor or Sophia. We do not, however, find it necessary to determine this question of fact. William and Jonathan had obligated themselves by their bond to convey to Mr. Smith the entire title to these lands. William executed a deed which fairly purports on its face to convey all the right, title and interest which he then had. Shall he, or those claiming under him, be allowed in a court of equity to assert that notwithstanding his agreement, and notwithstanding his deed on its face will bear that construction, still as a matter of fact he did not so intend.

Let us briefly recapitulate the facts:

1. More than eighty years ago Jonathan and William

duly executed an agreement under their respective hands and seals, agreeing "to cause to be conveyed" to Mr. Smith the entire title to these lands."

2. Mr. Smith then paid one-half or thereabouts of the purchase price, went into possession, and there seems no reason to doubt that he and those claiming through and under him have ever since occupied or at least controlled this property, claiming to own it.

3. William afterwards made a deed by which he manifestly intended to convey all the interest he *had*.

4. During the entire time William Duley and his heirs at law have acquiesced and made no claim of any interest.

5. Meantime the property has, through a large number of mesne conveyances, reached the complainant, who claims to have been when he purchased, and doubtless was, ignorant that the title was at all clouded; and

Lastly. While the last \$74 was probably never paid, Smith evidently was always ready, willing and anxious to pay it and have the supposed trouble with his title cleared up.

This is the situation that confronts us: "Courts of equity * * * discourage a stale demand * * * when the person setting it up has lost his moral * * * right to enforce it." Wood on Limitation of Actions, Sec. 60, 121.

A court of equity has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. "Nothing can call forth" a court of equity "into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches are always discountenanced." Boardman *vs.* Wathem, 1 How., 189; Piatt *vs.* Voltier, 9 Peters, 413. "The law of courts of equity * * * is that it will not entertain stale demands." *Id.*, 413. A claim "brought forward after a sleep of near thirty years, during which period the original parties * * * have disappeared and are no more," and acquiesced in during all that time by adverse interest should remain in oblivion." Randolph

vs. Ware, 3 Cranch, 503. "Where a man with * * * sufficient * * * means of knowledge of his rights and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, * * * or lies by for a considerable time and knowingly and deliberately permits another to deal with property, * * * the transaction * * * becomes unimpeachable in equity." 2 Herman on Estoppel, par. 1063. "This principle applies to the representatives of the party who has acquiesced." *Id.*, 1064.

In view of these facts and of these authorities what is the duty of this court?

Suppose that William, in his life-time, had sought for a reformation of his deed, or to recover an undivided interest in these lands. Is it not entirely clear that he could not have succeeded? Could he have been allowed in a court of equity to have asserted that while he had agreed to convey to Mr. Smith the entire title, and while his deed on its face would bear that construction, still, as a matter of fact, he did not *intend* so to do and the deed should be reformed? Most certainly not. All parties for all these years have treated the deed from Sophia to Mr. Smith as having conveyed to him her interest, and to him and his successors as the owners of these lands. It must be held that William Duley and those claiming under him are estopped from asserting that his deed to Mr. Smith did not convey *all* the interest which he had; we must so conclusively presume.

Lastly, does the condition of the record constitute a cloud which entitles the complainant to the relief for which he asks? "There is a cloud so long as by the record it is questionable if the title of the defendant is not *prima facie* better than the complainant's." *Eaton vs. Trowbridge*, 38 Mich., 457. We think equity should interpose to remove a cloud of this character.

We observe that the complainant in his bill "charges upon information and belief" that the \$74 mentioned in the

old 1824 chancery bill "was long since fully paid, but should the court find said amount * * * still due, complainant * * * tenders himself ready and willing and offers to pay the same into the register of this court or to the defendants," &c. We have said above that it seems to us probable that this \$74 has never been paid. In view of the complainant's concession, therefore, and without determining whether defendants might, as a matter of right, demand this sum of complainant, we think best to direct that the complainant shall, as proposed in his bill, pay to defendants the said sum of \$74.

And now in regard to the costs, it is not claimed that the defendants ever "laid claim" to any interest in these premises. A plaintiff who has filed a bill to quiet his title which had been neither impeached nor threatened was charged with costs. 2 Daniels Ch. Prac., 1381, note 6.

On the whole we think complainant should pay costs. Upon payment, therefore, to defendant's solicitor, or to the register of the court of the sum of \$74, together with the taxable costs of the cause, a decree will be entered in conformity with the prayer of the bill.

GEORGE DE GEOFFROY ET AL.

vs.

E. FRANCIS RIGGS ET AL.

1. The operation of the convention between the United States and France of February 23, 1853, is limited to the States of the Union and has no application to the District of Columbia.
2. A citizen of France cannot acquire title to real estate in the District of Columbia by inheritance from a citizen of the United States.

In Equity. No. 11,498. Decided July 8, 1889.
Justices COX and JAMES sitting.

HEARD in the General Term in the first instance.

BILL filed by George and Jules De Geoffroy, by their next friend, against E. Francis Riggs and Medora, his wife, Alice L. Riggs, Jane A. Riggs, and Cecilia Howard for a sale in partition of certain real estate owned by T. Lawrason Riggs, a citizen of the United States, and who died in this city January 19, 1888.

The complainants, who were citizens of France, were children of a deceased sister of the intestate, and her husband, Louis De Geoffroy, a citizen of France.

Madame De Geoffroy was a citizen of the United States at the time of her marriage, on March 12, 1872, and her death occurred on February 7, 1881.

The surviving brothers and sisters of the intestate were defendants to the bill.

The bill averred that T. Lawrason Riggs died unmarried and intestate and seized of a large amount of real estate (describing it) located in the District of Columbia, which descended upon complainants and defendants as his heirs at law.

The defendants demurred to the bill upon the ground that the bill disclosed complainants to be citizens of France,

and consequently incapable of inheriting real estate in the District of Columbia. The demurrer was set down for argument, and the question thus presented was as to the capacity of citizens of France to acquire title to real estate in the District of Columbia by inheritance from a citizen of the United States.

Mr. J. HUBLEY ASHTON for complainants:

Aliens, at the date of the convention between the United States and France, of February 23, 1853, were permitted under Article VII of said convention to take and hold an indefeasible title, in fee, to real estate in the District of Columbia. See Act of Assembly of Maryland of 1780, Ch. 8; Dorsey's Laws of Maryland; Buchanan *vs.* Deshon, 1 H. & J., 291; Chirac *vs.* Chirac, 2 Wheat., 269; Act of Md., Dec. 19, 1791, Burch. Dig., 221.

The Supreme Court has held that real estate in the city of Washington, acquired by an alien, during alienage, descended to his heirs, whether he was an alien or a citizen of the United States, at the time of descent cast, but that such property acquired by a person of foreign birth after his naturalization, vested in him as a citizen of the United States, not by virtue of the Maryland act, and did not descend to his alien relations. Spratt *vs.* Spratt, 1 Peters, 343; 4 *Id.*, 393.

The doctrine of the public law is, that "all international treaties are covenants *bonæ fidei*, and are, therefore, to be equitably, and not technically construed." Phillimore, Int. Law, Ch. 8, 79; Shanks *vs.* Dupont, 3 Peters, 249; U. S. *vs.* Arredondo, 6 Peters, 710; Hauenstein *vs.* Lynham, 100 U. S., 487.

The treaty includes and embraces, and applies to, the District of Columbia. This proposition would appear to be settled in this court, by the authority of its own decision, in the case of Jost *vs.* Jost, 1 Mackey, 487.

The bill, in Jost *vs.* Jost, was to enforce the rights asserted by the complainants under the second clause of the

treaty, and the court must have been satisfied, whether the question was discussed at the bar or not, and must have intended to decide, that real estate in the District was situated within the "States of the American Union," in the sense in which those terms were used in that instrument.

The court, no doubt, perceived that the third clause showed very plainly that those terms were used synonymously and co-extensively with the word "territories," of the United States, in the third clause, and that when the framers of the treaty spoke of the "States of the American Union," they meant to describe and include the whole territory of the United States.

The case, obviously, would not have been differently decided if the words "States of the American Union" had been repeated in the third clause of the enactment.

The judgment in that case involved necessarily the determination that the District is a "State," and its laws are the laws of a State of the American Union, within the meaning and intent of the Swiss Convention.

The words of a treaty, as of a statute, are to be interpreted in the sense in which they best harmonize with its subject and with its object. *Vattel*, Bk. 11, Ch. 17, Sec., 285; *Hepburn vs. Ellzey*, 2 Cranch, 452.

The term "States," when used in an international treaty, is obviously to be understood, primarily, in the sense attached to it by writers on the law of nations. *Phil. Int. Law*, Ch. 8, Sec. LXIX.

The term "State," as employed in the Act of Congress for the government of seamen in the merchant service, has been held to include an organized Territory of the United States. *In re Bryant, Deady*, 118.

The Act of Congress approved March 3, 1887, entitled "An act to restrict the ownership of real estate in the Territories to American citizens, and so forth," amounted to a distinct refusal by Congress to except the District from the operation of the Act of 1887.

1. The intention of the lawmaker constitutes the law, and what is implied in a statute is as much part of it as what is expressed. *U. S. vs. Babbit*, 1 Black, 61; *U. S. vs. Freeman*, 3 How., 565; *Railroad Co. vs. Horst*, 93 U. S., 301; *Platt vs. U. P. RR. Co.*, 99 U. S., 60.

2. The judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction. *Oates vs. Nat. Bank*, 100 U. S., 244.

3. Congress is not to be presumed to have used words to no purpose. *Platt vs. Union Pacific RR. Co.*, 99 U. S., 59; *P. M. Genl. vs. Early*, 12 Wheat., 148.

4. The dogma that statutes in derogation of the common law are to be strictly construed has really no place in our jurisprudence. There is no reason why they should be construed differently from other statutes. *Sedgwick, S. & C. L.*, 317; *Endlich, Int. Stat.*, 175; *Munn vs. Illinois*, 94 U. S., 134.

A statute repeals what is repugnant to it in an earlier statute or the common law, and, repeal or no repeal, substitution or no substitution, is merely a question of legislative intention. *U. P. RR. Co. vs. Cheyenne*, 113 U. S., 516; *King vs. Cornell*, 106 U. S., 395; *Murdock vs. Memphis*, 20 Wall., 617; *U. S. vs. Tynen*, 11 Wall., 88; *Bartlett vs. King*, 12 Mass., 546; *Eckloff vs. The District*, 4 Mackey, 572.

A mistaken opinion of the legislature concerning the law does not make the law, but if this mistake is manifested in words competent to make the law in future, they must have that effect. *P. M. Genl. vs. Early* 12 Wheat., 148; *Wilberforce, S. L.*, 15; *Maxwell Int. Stat.*, 279, 280; *R. vs. Oldham, L. R.*, 3 Q. B., 474.

The effect of the Act of 1887 is to repeal or abrogate the Maryland Act of 1791, so far as regards aliens who have not declared their intention to become citizens of the United States, and to confer upon aliens the right to acquire real estate in the District of Columbia, by inheritance, from citizens of the United States.

The provision of the Act of 1887, under consideration, should be construed liberally and beneficially, so as to give the words of the statute the most extensive meaning of which they are susceptible, in favor of the right claimed by the complainants in this case.

"As to the right of the children, or nearest relatives of the deceased to inherit, its origin," says Mr. Sergeant Stephen, "is to be traced to a higher source than the mere institutions of civil society. There is a general and intuitive feeling that it has nature on its side, and there seems in truth good reason to refer it to the same natural title of occupancy on which the right of property itself is founded." New Commentaries on the Laws of England, Stephen, Vol. 1, 169.

Mr. JOHN SELDEN for defendants:

The treaty of Amity and Commerce concluded between the United States of North America and France, on February 6, 1778, was annulled by Act of Congress, July 1, 1798 (1 Stat., 578), and as the Convention of Peace, Commerce and Navigation concluded between the United States and France, on September 30, 1800, expired by its own limitation, eight years afterwards, in pursuance of an additional article (U. S. Pub. Treaties, 232), inserted by the Senate on February 3, 1801, (*Chirac vs. Chirac*, 2 Wheat., 272, 277; *Carneal vs. Banks*, 10 *Id.*, 182, 189; *Buchanan vs. Deshon*, 1 Har. & G., 290, 291,) the single *treaty stipulation* which can be supposed to operate upon the capacity of French citizens to inherit lands in the United States, must be found in Article VII of the Consular Convention concluded between this country and France on the 23d day of February, 1853.

But the operation prescribed for this article (so far as the same becomes material in the present controversy), is limited by the terms of the article, to "*the States of the Union.*"

By this language, the members of the Union become distinguished at once from the republic they compose.

Neither the District of Columbia, nor a Territory of the

United States, falls within the definition of a *State*, as that term is employed in the Constitution, or in the Acts of Congress, has long been familiar to all. *Hepburn vs. Ellzey*, 2 Cranch, 445; *Corporation of New Orleans vs. Winter*, 1 Wheat., 94; *Barney vs. Baltimore City*, 6 Wall., 287.

It is not supposed that it was intended to be decided, in a particular case, that this District was embraced in the words "States of the American Union," as used in the convention concluded between the United States and the Swiss Confederation, on the 25th of November, 1850. *Jost vs. Jost*, 1 Mackey, 487.

The question of inclusion, *vel non*, does not appear to have been raised in that case, and is left wholly unnoticed in the learned opinion of the court.

"The treaty does not claim for the United States," says Taney, C. J., "the right of controlling the succession of real or personal property within a State. And its operation is expressly limited 'to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force.'" *Prevost vs. Greneaux*, 19 How., 7.

By the common law, as the same was transplanted into Maryland, the alien was excluded from the acquisition of land by descent. *Buchanan vs. Deshon*, 1 Har. & G., 289; *Guyer's Lessee vs. Smith*, 22 Md., 347.

The Act of Maryland of 1780, Ch. 8, (App., pp. 36, 37,) was passed during the Revolution, and was inspired, as indicated in the preamble, as well as by the liberal provisions contained in Article XI (originally Article XIII) of the Treaty of Amity and Commerce concluded between the Thirteen United States of North America and France, on February 6, 1778 (*ante* p. 2), as by the particular sentiment of gratitude entertained by the people of Maryland towards a generous and invaluable ally. 1 *Kitty's Laws*. See *Buchanan vs. Deshon*, 1 Har. & G., 291.

The subsequent repeal of this treaty, effected, it is conceded, no alteration in the statute which the treaty had, in

part, at least, occasioned. *Chirac vs. Chirac*, 2 Wheat., 272.

But, as has been justly observed, the Maryland Act of 1780, "will be found not to be co-extensive with the provisions of the treaty to which it refers." *Buchanan vs. De-shon*, 1 Har. & G., 291.

"This act certainly requires that a French subject, who would entitle himself under it to hold lands in fee, should be a citizen according to the law which might be in force at the time of acquiring the estate. Otherwise he could only purchase or hold for life or for years. *Chirac vs. Chirac*, 2 Wheat., 270.

The Act of Maryland of December 19, 1791, ratifying her cession to the United States, provides, in effect, in its sixth section, that "*any foreigner*" may, by *deed* or *will*, take and hold lands within the ceded territory, and such land may be conveyed by him, and be transmitted to and inherited by his heirs and relations, as if he and they were citizens of Maryland.

It has long been settled, however, that these provisions do not remove the disability, arising from common law principles, of an alien to *inherit* lands lying in this District, *from a citizen* thereof. *Spratt vs. Spratt*, 1 Peters, 343; 4 *Id.*, 393; *Jost vs. Jost*, 1 Mackey, 493.

The history of the growing times in which the Act of March 3, 1877, originated, must remove every suspicion that it was the intention of Congress, in anywise to enlarge the abilities of aliens to acquire or hold real estate in the Territories or the District of Columbia.

The act was passed in response to a public sentiment, strongly excited in particular localities, against the vast and increasing absorption of lands in the Territories, both by non-resident aliens, and by corporations and associations, controlled as well by foreign as by domestic stockholders.

The District of Columbia was not within the mischief, which, in common opinion, was supposed to threaten the Territories.

That the statute prescribes a forfeiture for the violation of its prohibitions is admitted. And titles by inheritance are *excepted* from its prohibitions. But even in penal enactments, "the intention of the legislature is to be collected from the words they employ." *United States vs. Wiltberger*, 5 Wheat., 95; *The Emily and Caroline*, 9 *Id.*, 388; *American Fur Company vs. United States*, 2 Peters, 367; *United States vs. Morris*, 14 *Id.*, 475; *United States vs. Hartwell*, 6 Wall., 396.

The subject of inheritance was minutely, and, in some particulars, differently regulated in the Territories of Arizona, Rev. Stat., 1887, Tit. XIX; Dakota, Rev. Code, 1883, (2d ed. by Levissee), Div. II, Part IV, Tit. VI; Idaho, Rev. Stat., 1887, Secs. 5700-5714; Montana, Compiled Stat., Ch. XIX; New Mexico, Compiled Laws, 1887, Secs. 1407-1433, and Washington, Code 1881, the last, Secs. 1957-1971.

And in the District of Columbia, the law of descents is governed, in general, by the Act of Maryland of 1786, Ch. 45. *Thomp. Digest*, 178-182.

It will be admitted, at once, that the Act of Congress of March 3, 1887, does not supersede the necessity of resorting, *in the case of aliens*, to the general local law, in order to determine whether land may be acquired, through inheritance, by a person whose parents had not intermarried at the time of his birth, *Stevenson's Heirs vs. Sullivan*, 5 Wheat., 257, or by one whose ancestor was not last seized of the property, *Chirac vs. Reinecker*, 2 Peters, 625, whether land must be transmitted to lineal descendants, *per stirpes*, or may pass, on failure of such descendants, to other collaterals than those of the blood of the first purchaser. *Gardner vs. Collins*, 1 Peters, 58.

Under the Act of Maryland of 1780, Ch. 8, *ante* 12, real estate, as we have seen, may be acquired, and, upon certain condition held, also, by citizens of France, through inheritance from Frenchmen who have become citizens of the United States.

Similar provisions were contained in the original constitution of Texas. *Airhart vs. Massieu*, 98 U. S., 494, 495.

And aliens, in general, may acquire real estate by descent from each other, under Section 6 of the Act of Maryland of December 19, 1791.

Does the exception made in Sec. 1 of the Act of Congress, March 3, 1887, of such real estate "*as may be acquired by inheritance*," embrace also such real estate as, under our local law, *may not* be acquired by inheritance?

The capacity of an alien to inherit real estate, was rendered that of a citizen of the United States, by the laws of Dakota, (Rev. Code, 1887, Sec. 3417,) Washington Territory, (Code, 1881, Sec. 2419,) and Wyoming, (Rev. Stat., 1887, Sec. 2227.)

In Idaho, (Rev. Stat., 1887, Sec. 5715,) and Montana, (Compiled Stat., 1887, p. 400,) the like capacity was conferred upon "resident aliens," but no non-resident foreigner could take by succession unless he appeared and claimed by succession within five years after the death of the decedent from whom he claimed.

And in Arizona, (Rev. Stat., 1887, par. 1472,) though an alien may take land, by devise or descent, yet, in either case, to avoid forfeiture and escheat of the property, he must, at the end of five years, (in the absence of treaty provisions,) either become a citizen of the United States, or make sale of the land, unless by the laws of the country to which the alien belongs, the citizens of the United States are there permitted to take and hold lands by devise or descent.

Was it the intention of Congress to repeal the entire local law of the District and of the Territories in respect to inheritance by aliens, without providing any regulation of its own upon the subject?

And was it the purpose of the first section of the Act of Congress of March 3, 1877, to confer upon the alien *greater* capacity to inherit lands, both in the District and in the Territories, than was accorded by the local law?

"No statute," observes Mr. Justice Strong, "is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw vs. Railroad Co.*, 101 U. S., 565.

Mr. Justice JAMES delivered the opinion of the Court :

The complainants seek to establish a right of inheritance to certain lands in this District as heirs of T. Lawrason Riggs. As the case stands on demurrer to their petition the facts are, for the purposes of our consideration, as therein stated.

The parents of the complainants intermarried on the 12th day of March, 1872. Their father was Louis de Geoffroy, who was born in France, and was, at the time of the birth of each of them, a citizen and subject of France and an officer in the diplomatic service of the French Government and has always been domiciled in France. At the time of her marriage with their father their mother was Kate S. Riggs, who was a citizen of the District of Columbia, wherein she was born, and of the United States. The complainant, George Louis Dominique Antoine de Geoffroy, was born on the 14th day of June, 1873, at Pekin, in China, while his father was French minister plenipotentiary to that country and was residing there only as such minister, and the complainant, Jules Francois George de Geoffroy, was born on the 18th day of October, 1875, at Cannes, in France. Their mother was a sister of T. Lawrason Riggs, whose heirs they claim to be, and of all the defendants, except Medora, wife of the defendant, E. Francis Riggs. She departed this life on the 7th day of February, 1881, and T. Lawrason Riggs departed this life on the 19th day of January, 1888, unmarried and intestate. The defendants, E. Francis, Alice L., and Jane A. Riggs, are, and have always been, citizens of the United States and of the District of Columbia; and the defendant, Cecelia Howard, while a citizen of the United States and of said District, intermarried with Henry Howard,

who was then, and has always been, a British subject, and has since that time resided with him in England. The bill describes the real estate of which T. Lawrason Riggs died seized, and claims that the complainants, his nephews, are co-heirs with the brother and sisters of the decedent.

By the common law, as it existed in Maryland and was continued and established in this District, aliens were incapable to hold lands here. *Buchanan vs. Deshon*, 1 Har. & G., 289; *Guyer's Lessee vs. Smith*, 22 Md., 347. It follows that they can have that capacity only by some positive enabling concession granted by the sovereignty of the soil. We have only to inquire, therefore, what concession to aliens now exists.

By the sixth section of the Act of Maryland of 19th December, 1791, ratifying her cession of the Territory of Columbia to the United States, it was enacted :

"That any foreigner may, *by deed or will* hereafter to be made, *take and hold lands* within that part of the said territory which lies within this State in the same manner as if he was a citizen of this State, and *the same lands may* be conveyed by him and transmitted to and *be inherited by his heirs* and relations as if he and they were citizens of this State: *Provided*, That no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen."

By virtue of this provision lands *acquired by an alien by deed or will* were inheritable by his alien heirs. It was immaterial that after such acquisition, he became a citizen; his lands were still of the class of lands which were inheritable by alien heirs. But, as this law did not provide that lands acquired by *a citizen* should be inheritable by alien heirs, their capacity in such cases was left as at common law, and by that law they could not hold, and therefore could not take such lands. *Spratt vs. Spratt*, 1 Peters, 343; 4 *Id.*, 393.

Inasmuch as the decedent in this case had always been a citizen of the United States and of the District of Columbia, and therefore had acquired his lands as a citizen, the

complainant could not derive from this statute any capacity to inherit them, but were, on the contrary, denied such capacity by the still existing common law.

The law, and the consequent incapacity of the complainants, stood thus when a consular convention with France was concluded on the 23d of February, 1853. The next question, then, is whether they derived from this convention the capacity to inherit from a citizen. Its seventh article was in the following words:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the Government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens."

This article presents several interesting questions of construction, but the only one that is relevant to the present inquiry is, whether it applies at all to the District of Columbia and the Territories of the United States. It can only be made to do so by interpreting the word States as used in a sense which is consistent with the context. The

States indicated are manifestly political bodies which have an independent power to make laws for themselves. It is with reference to this power that they are grouped in two classes: One of them, including those States which, by their own laws, had already conceded certain capacities to aliens; the other, those States which had not done so. The stipulations of the United States were appropriate in relation to such bodies, and were inappropriate to places which were, as to the matter in hand, wholly under the control of the Government of the United States. If in any of the latter the desired laws did not already exist, the United States would hardly engage to address them in terms of recommendation and request. Whether we consider, then, the mere words or the operation of this article it seems plain that it was not intended to apply to the District of Columbia or to the Territories of the United States.

If it seems remarkable that the very places which were wholly subject to the United States, in the matter of land tenure, should be omitted from a convention of reciprocity with a country which opened the whole of its dominions to our citizens, it is possible to suggest reasons which may have determined the course of our own Government. It may have appeared to be unnecessary to include the District of Columbia, inasmuch as its local law, already by affirmation a law of the United States, had secured to all aliens the capacity to acquire lands by purchase, and the capacity to inherit lands from alien purchasers. As to the Territories, it will be remembered by those who can recall the political contests of that period, that the settlement of these prospective States had become the subject of extreme sensibility. Whatever should determine the character of their populations might thereby determine their relation to a subject of intense antagonism. It is not improbable, therefore, that the United States declined to regulate the subject of land tenure in the Territories by this convention, because it would not, in effect, deal with a foreign power concerning its own political future.

But whatever may have been the reasons for that omission, we are of the opinion that the District of Columbia and the Territories were intentionally omitted from the treaty of 1853. It follows that no enlargement of the capacity of inheritance which had already been granted to aliens by the Maryland Act of 1791, can be derived from this treaty. Aliens were still incapable, therefore, to inherit lands in this District acquired by citizens, when the act of Congress, relating to the acquisition and holding by aliens of lands in the Territories of the United States and in the District of Columbia was passed on the 3d of March, 1887. The next question which we have to consider, then, is whether that act conceded to aliens the capacity to inherit from citizens of the United States.

Its first section provides, "that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, *except such as may be acquired by inheritance*, or in good faith in the ordinary course of justice in the collection of debts heretofore created; *Provided*, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

It is claimed, on the part of the petitioners, that the words, "*except such as may be acquired by inheritance*," have an enabling operation, and confer upon aliens the right to acquire lands in the District of Columbia *by inheritance from citizens of the United States*.

This exception is an inartificial statement of intention, whatever that intention may have been; but it is a matter of judicial observation that this is not the form in which a new grant is usually expressed, while it is not unusual to express in this way an intention to exclude from the operation of the general rule, already set forth in the statute, some existing matter and to leave that matter subject to the existing law.

As a fact, laws relating to the subject of alien heirs did then exist both in the District of Columbia and in the Territories. There was, therefore, something to save and continue, if such was the intention of this exception. In this District, as we have seen, the Act of 1791 gave to aliens the capacity to inherit from alien purchasers, and the common law denied them the capacity to inherit from citizens. In Dakota (Rev. Code, 1887, Section 3417), in Washington Territory (Code 1881, Section 2419), and in Wyoming (Rev. Stat. 1887, Section 2227), the capacity of an alien to inherit real estate was rendered that of a citizen of the United States. In Idaho (Rev. Stat., 1887, Section 5715), and Montana (Compiled Stat., 1887, p. 400), the like capacity was conferred upon "resident aliens," but no non-resident foreigner could take by succession, unless he appeared and claimed by succession within five years after the death of the decedent from whom he claimed. And in Arizona (Rev. Stat., 1887, par. 1742), though an alien might take land by devise or descent, yet in either case, to avoid forfeiture and escheat of the property he must, at the end of five years (in the absence of treaty provisions), either become a citizen of the United States or make sale of the land, unless, by the laws of the country to which the alien belonged, the citizens of the United States were there permitted to take and hold lands by devise or descent.

Now, the exception in question might operate to exclude lands hereafter acquired by inheritance under any of these laws from the general prohibition against acquiring them

at all, without attributing to its language any unusual sense or effect. The same observation may be made concerning the next clause of the exception, which includes lands hereafter acquired in good faith in the ordinary course of justice in the collection of debts heretofore created. Indeed this clause is even more suggestive than the other of a reference to existing laws. The restriction to debts *heretofore* created strongly implies that it was proceedings for their collection, authorized by existing laws, which were to be saved by this exception. Its obvious purpose was to avoid impairing the obligation of contracts by taking away any part of the means of collection already secured to alien creditors in common with other creditors.

If, under the three existing laws, an alien creditor had a right not only to a judicial sale of his debtor's land, but, in order to save himself, to become a buyer at such sale, it would certainly be an impairment of the obligation of his contract to take from him that capacity to purchase. Whatever may be said of the mere power of the United States to do what the States are forbidden to do in that respect, it must be assumed by the courts that the United States always proposes to be bound by that rule. It was imperative, therefore, that a clause having the very effect which we impute to this exception—namely, to save the operation of existing laws touching the collection of debts already contracted—should be inserted in this prohibitory statute.

If this exception was a saving of rights secured by then existing laws relating to the collection of debts, it seems necessarily to follow that it must also be a saving of existing provisions for alien inheritance. However different the reasons applicable to the two subjects, they seem to be so connected in this exception that its office in both cases must be the same. We think that if it was not intended to be a grant of a new right or capacity in one of these cases, but only a saving of an existing status, it must be so treated in the other.

In conclusion, it is to be observed that the concession of a new capacity to aliens hardly seems consistent with the temper and circumstances of this legislation or with its denial for the future of a hospitality which had been extended here since the establishment of the seat of Government. On the other hand, a design to save from this sweeping denial the capacity of an alien purchaser's kindred to inherit the land which he had already acquired seems to be entirely consistent even with the temper of this law. To do so was actually a requirement of good faith. To the practical sense of such a purchaser the capacity of his kindred to inherit his purchase must have seemed to be one of the elements of its value and even to have been bought with the land. Since aliens had been allowed to acquire lands here with a long-standing assurance that their home kindred might inherit them, it was but an act of good faith to keep that promise, and it was, we think, for that purpose that this exception was made, and not for the purpose of granting what had so long been denied.

The demurrer to the bill is sustained.

CHARLES C. DUNCANSON

vs.

THE NATIONAL BANK OF THE REPUBLIC; THE
RONCESVALLES MINING CO.; THE SANTA
MARIA MINING CO. ET AL.

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1. Stock in a corporation, although the certificates thereof are taken into the manual possession of the marshal are not the subject of attachment in this District.
 2. The Court in General Term can hear and determine no chancery cause at first instance, unless it comes to it duly certified for such hearing by the Equity Court.
 3. Where it is evident that a cause certified to the General Term for hearing in the first instance cannot be proceeded with because of the absence of necessary parties, the cause will be remanded for amendment of the pleadings.

In Equity. No. 2,518. Decided October 27, 1889.

The CHIEF JUSTICE and Justices JAMES and MONTGOMERY sitting.

HEARING in the first instance on bill and cross-bills filed to settle rights of parties to certain stock certificates.

THE FACTS are sufficiently stated in the opinion.

Messrs. H. W. GARNETT and H. E. DAVIS for complainant.

Messrs. LEIGH ROBINSON and C. A. ELLIOT for the bank.

Mr. J. HOLDSWORTH GORDON for Burr.

Mr. Justice MONTGOMERY delivered the opinion of the Court:

This cause was certified here for hearing in the first instance. A brief statement of the material facts seems desirable.

In the year 1880, one Benjamin F. Bigelow purchased two hundred shares of the capital stock of each of defendant mining corporations, paying therefore \$1,500, and taking the certificates in his own name.

In June, 1882, the defendant bank sued out a writ of attachment against Bigelow, which writ was placed in the

hands of defendant, Henry, then Marshal of the District of Columbia, and he at once levied the same on certain personal property, at the same time seizing and taking possession of said certificates, which possession he has ever since had and now has.

On the 16th day of February, 1885, the bank recovered in said suit a personal judgment against Bigelow for more than \$20,000. No execution has issued and the judgment remains wholly unsatisfied.

Two days after the attachment suit was begun Mrs. Bigelow conveyed to Mr. Duncanson her equity of redemption in two parcels of real estate, and within a few months thereafter Mr. Bigelow executed and delivered to Mr. Duncanson a paper purporting to be an absolute assignment of the certificates and stock above mentioned, and very shortly thereafter he assigned to him some other stock certificates. Both parcels of land were afterwards sold at trustees' sale; Duncanson bid in one and perfected nominal title in himself and realized a sum of money on the sale of the other parcel. He has never disposed of any of the stock.

On the 27th of June, 1885, Mr. Duncanson filed the original bill in this cause, in which he prays that defendant, Henry, be directed to deliver the stock certificates so signed by him to Miss Duncanson, and that the defendant corporation be directed to cancel the same and issue new ones to him.

The bank answered and also filed a cross-bill, in which bill it prayed for a reference to the auditor to ascertain how much was its due from Bigelow. That "all necessary accounts" might be taken "inquiries made and directions given," and that the "alleged assignment" of the stock and certificates in dispute, by Bigelow to Duncanson, might be declared void.

June 6, 1888, Mr. Burr petitioned to be "permitted to become a party defendant * * * and to have an opportunity to establish *his* claim and title to said stock." On

the same day his petition was granted, and thereafter by consent of all parties who appeared in the cause, such petition was treated as his answer and cross-bill.

None of the other defendants answered, and in due time testimony was taken on behalf of Mr. Duncanson, Mr. Burr and the bank, respectively. It may be well to suggest here that at the argument, as well as in the briefs of counsel, it seems to have been assumed that another cause, which was on the 22d day of May, 1885, instituted on behalf of the bank, by the filing of its bill in equity against Bigelow, Henry and others, was also before us for disposition, and such assumption has undoubtedly led to some confusion as to what issues and whose interests are really involved here, but plainly that old cause is not before us.

In the first place it is not at issue, and in the next it has not been certified here, and it hardly need be said that this Court in General Term can hear and determine no chancery cause at first instance, unless it comes here duly certified for such a hearing by the Equity Court. R. S. D. C., Sec. 800.

For the purpose of disposing of the case as we feel obliged to do, we need look no further into the pleadings in the cause before us, and we need refer to the evidence but briefly.

Mr. Burr was called as a witness and testified that he gave the \$1,500 to Mr. Bigelow at the request of his, Burr's, wife, to be invested for himself and his wife, and he adds: "The fact is the money was part of my wife's patrimony. It was hers really, but she asked me to give Frank (Mr. Bigelow) a check to invest some money for *her*." "The greater part of it was that money that she had derived from her father's estate."

The check referred to by Mr. Burr is indorsed as follows: "This sum was handed to Mr. B. F. Bigelow for the purpose of enabling him to invest it for Mrs. T. A. Burr, which he has done to our entire satisfaction. (Signed) T. S. Burr."

In view of this testimony is it not very plain that Mr. Burr cannot properly ask for a decree declaring that these certificates and this stock belong and shall be delivered to him?

Now, how stands the case of the bank? Its bill is in no sense, and is not claimed to be, a creditor's bill; indeed, the judgment debtor is not made a party. It is framed upon the theory that it has a lien on the certificates or on the stock or on both by virtue of the seizure by the marshal on the writ of attachment. In our opinion such seizure and possession gave it no lien. The seizure itself was unlawful and by it nothing was obtained but the manual possession of the certificates, and we doubt if the bank should be permitted to assert even manual possession so obtained.

Besides, there is evidence in the case fairly tending to show that it has the money of Mrs. Burr that paid for these stocks, and that the equitable title thereto was all the time in her.

It is not improbable that she may, by her conduct, or by her silence, be estopped from asserting title, but she is not a party. She has not been heard, and we cannot determine even *that* question in her absence. Again, it is urged by counsel for the bank, that Duncanson took the conveyance of the real estate from Mrs. Bigelow, to which he afterwards perfected title at a fixed price; while on the part of Duncanson it is insisted that there was no price agreed upon, and that he perfected title legitimately and now actually owns the property. But how can this question be settled without the presence of Mrs. Bigelow?

At any rate the bank having no lien to enforce, not being here with the creditor's bill, the evidence tending as it does to show Mrs. Burr's interest in the stock, no relief seems possible upon the pleadings as we find them.

Had Bigelow been impleaded, and an issue made which would have entitled the bank to reach his general equitable

assets, if any, which remained in the hands of Mr. Duncan-son, there would still seem to be a difficulty about making a decree determining the ownership and price of such real estate in the absence of Mrs. Bigelow.

Lastly, what shall be done with the bill of Mr. Duncan-son? It prays for the delivery of the stock certificates to him, for their cancellation, and for the issue of new ones to himself.

Manifestly this decree cannot be made as the cause now stands, until Mrs. Burr shall be impleaded. We have already said all we need to as to the status of Mrs. Bigelow.

In short it seems to us impossible to grant any relief in this cause, as we find it presented.

Possibly, however, the parties or some of them may desire to amend their pleadings, and bring before the court other additional parties.

In that view we will remand the cause to the court below where the application for leave to amend and amendments may be made as shall be there permitted.

JAMES T. BRADFORD

vs.

THE DISTRICT OF COLUMBIA.

1. In a suit to establish a title derived from condemnation proceedings all the facts necessary to the jurisdiction to condemn must be established.
2. But when the relief sought is the annulment of the condemnation the burden is on the party asking such relief to show that the proceedings were illegal.
3. B, being owner of a lot of ground, a portion of it was condemned as an alley. Afterwards complainant conveyed the lot to C, describing it as bounded by said alley. At a still subsequent period B, by bill in equity attacked the condemnation proceedings as void. *Held*, That B's conveyance to C, while it did not dedicate the alley to the public, gave to C and his assigns the right to enjoy the alley as an easement, and, therefore, even if the condemnation proceedings were void equity would not interfere.

In Equity. No. 10,888. Decided November 18, 1899.

The CHIEF JUSTICE and Justices HAYNER and JAMES sitting.

APPEAL by the defendants from a decree of the Special Term on a bill to annul proceedings condemning private property for alley purposes, the court below having decreed the condemnation proceedings void.

THE FACTS are sufficiently stated in the opinion.

Mr. GUION MILLER for complainant:

"No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." Fifth Amendment United States Constitution.

The owners not having had an opportunity to be heard, the trial was not such a jury trial as is contemplated by the Seventh Amendment of the United States Constitution.

The ordinance provides for a jury of twelve to ascertain the damage which may accrue to any individual.

"Where a jury is provided the party must have an opportunity to appear when it is impanelled, that he may make objections. And he has the same right to notice of the time and place of assessment that he would have in any

other case of judicial proceedings, and the assessment will be invalid if no such notice is given." Cooley's Constitutional Limitations, *563; Powers *vs.* Bears, 12 Wis., 213; People *vs.* Tallman, 36 Barb., 222; Bonville *vs.* Ormrod, 26 Mo., 195; Dickey *vs.* Tennison, 27 *Id.*, 376; Chase *vs.* Hathaway, 14 Mass., 223; Commissioners *vs.* Mining Co., 61 Md., 553.

The proceedings must show on their face that there was notice to the owners. The record fails to show any notice, and testimony of Webb and Shurtliff clearly shows that no notice was ever given.

Webb and their agent Stickney distinctly testify that they had notice. And Shurtliff, who was a non-resident, says he has no recollection of receiving notice. Pomeroy, Constitutional Law, 157; Hager *vs.* Reclamation District, 111 U. S., 701; Windsor *vs.* McVeigh, 93 *Id.*, 274; Hollingsworth *vs.* Barber, 4 Peters, 475; Thatcher *vs.* Powell, 6 Wheat., 126.

So far as this suit is concerned the fact that Bradford has made conveyances of portions of the lot in question is of no consequence. Those deeds do not convey the part of the lot attempted to be condemned. The title to that remains in Bradford, but a cloud is thrown upon his title to it by the records of the condemnation proceedings.

This cloud equity will remove. Ward *vs.* Chamberlain, 2 Black, 430; Van Wyck *vs.* Knevals, 106 U. S., 360; Clark *vs.* Smith, 13 Peters, 203.

Mr. H. E. DAVIS for defendant.

Mr. Justice JAMES delivered the opinion the Court:

The bill in this case states that while certain lots on Massachusetts avenue were owned by Webb and another, a jury was summoned to condemn an alley through the square, taking a part of this property and a part of an adjoining lot; that no notice was given to the owners, and that for want of such notice the jury had no jurisdiction to condemn; that without any knowledge even of the fact, or

any constructive notice by record, there had been a proceeding to condemn the alley; the complainant had purchased the property, and that, therefore, the proceedings for condemnation were, as against him, a nullity. It is alleged that nevertheless they constitute a cloud upon his title, and the bill prays that the alleged condemnation be decreed to be void as to his lots, and the record thereof cancelled.

Where the title is derived from proceedings for condemnation, it would be necessary, in a suit to establish that title, to prove all facts necessary to the jurisdiction to condemn, and among these notice to and an opportunity to be heard on the part of the original owners. But when the active interposition of a court of equity is asked, and the relief sought is the annulment of the condemnation, it is for the party asking that kind of relief to show that the proceedings were illegal. Accordingly it is for the complainant to show that the jury proceeded in this case without notice to the lot owners from whom he purchased. We have examined the evidence on this point and do not find it sufficient.

It appears that complainant had, before he filed this bill, sold to Carusi the whole of his said lot, except so much as was included in this alley; and that his deed to Carusi described the property as bounding thereon. This did not constitute a dedication of the land as a public alley, but it did give to the grantee an easement, for the enjoyment of which the alley must remain open to use by Carusi and his assigns.

The strip subject to this easement is all that remains in the complainant, and it is only to remove a cloud upon his title to the land thus subject that this relief is asked. We think that, even if the condemnation proceedings had been shown to be without jurisdiction, equity should not be asked to interfere actively, when the land must remain open to the easement created by the complainant.

The decree is reversed and the bill is dismissed.

MARY E. KLEINDIENST ET AL.

vs.

GEORGE J. JOHNSON ET AL.

1. A bond given by husband and wife, though void as to the wife, will be good as to the husband, and a deed of trust given by the wife upon her separate property to secure such a bond is valid.
2. Although premiums paid for moneys advanced to borrowers by a building association be usurious, yet the Statute (Sec. 716 R. S. D. C.) confers no authority on the court on an accounting between the parties to set off against the principal debt the sums so paid.

In Equity. No. 9,758. Decided March 5, 1889.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

APPEAL from a decree of the Special Term on a bill for injunction and an account.

STATEMENT OF THE CASE.

The bill in the case was filed by Joseph Kleindienst and his wife, Mary, against the trustees and officers of the Second Washington Co-operative Building Association for an account and release of deeds of trust given to secure advances.

The association was organized in September, 1874, and its object is to aid stockholders in procuring homesteads, according to a plan set forth in a constitution. The shares were of the nominal value of \$1,000, and on each share held the stockholder paid \$1 per month. Advances were to be made of \$1,000 on each share to the highest bidder at a rate of "premium" of not less than 50 per cent., which advances with the premium thereon, were to be repaid to the association at the rate of one hundredth part of each monthly.

The plaintiff, Joseph Kleindienst, became the owner of four shares of stock and obtained \$3,000 on three shares in December of 1875, at a premium of 135 per cent., and under the constitution became liable thereupon to pay the

association monthly the one hundredth part of the loan of \$3,000	\$30.00
One hundredth part of the premium \$4,050.....	40.50
Monthly dues on four shares of stock.....	4.00
	<hr/>
	\$74.50

In September of 1876, being in arrears, in these payments, he obtained an advance of \$500, which was applied to the payment of the arrears, by which the monthly payments required of him were increased to the extent of \$11.75.

Complainant was unable to make regularly the payments required but from December, 1875, to May, 1884, he repaid to the association the sum of \$4,455.36. In November, 1885, the association rendered him an account, claiming the sum of \$4,410 as still due to it, and subsequently rendered him another account, claiming \$3,502.45 as due, and still later rendered another account, claiming as due the association the sum of \$2,453.19.

The complainants executed a bond and deed of trust conveying the separate estate of Mrs. Kleindienst to secure the performance of the conditions of the bond, which the bill alleged were not contracts in relation to the separate estate of the wife and were void; that the "premium" which it was a condition of the bond should be paid in monthly portions with the principal was but another name for "interest" and was in excess of any lawful rate, and that according to any lawful method of accounting the debt had been over-paid.

The bill also averred that at the time the complainant became a stockholder, he was informed, in response to a request made to the defendant, Callan, the treasurer, for a copy of the constitution, that the supply was exhausted, but was given a copy of the constitution of another association which was said to be substantially similar; and further averred the accounts rendered were not stated in accordance with the provisions of either instrument, and that in 1877,

at the instance of the defendant Callan, and with a view to reducing his monthly payments he purchased through Callan three other shares of stock in the association and became entitled to \$3,000 thereon at a premium of 112 per cent., but was not permitted to substitute the new loan for the old one.

The answers of the defendant admitted the loans, bond, deed of trust, &c., stated that the shares upon which the loans were made stood upon the books of the association in the name of Mrs. Kleindienst; averred that except as to the first three monthly payments, complainants had never complied with their contract; averred that complainants could have got a copy of the constitution by applying to the defendant, Reed, the secretary, and denied that a copy of the constitution of another and different association had been given them by defendant, or that either of the defendants had knowingly misdirected the complainants, and claimed that whether "premium" is another name for interest is a matter of law, and that the bond was a part of the deed of trust, and together they constituted the contract; that the complainants were indebted to the association in a large amount; and that the deed should be enforced to secure payment of the unpaid indebtedness.

Upon a reference to the Auditor he adopted the last account as most favorable to the complainant, and at the request of counsel for complainant stated an alternative account charging the complainant with the amounts advanced to him and crediting him with all moneys paid by him at any time, which latter method of accounting showed an overpayment by complainant to January 1, 1885, of \$60.24.

The case then came on to be heard upon the pleadings and the report of the auditor, and a decree was passed affirming the report and denying the injunction. From this decree the plaintiffs appealed to the General Term.

Messrs. HUGH T. TAGGART and RANDOLPH COYLE for complainants:

The alternative account is the only proper account between the parties.

The constitution, which the auditor treats as the "contract" between the parties formulates an elaborate scheme of operations for the loaning of money, but which analysis proves to be of a highly usurious character. It is not, therefore, a lawful contract and it should not be enforced.

Upon the face of the scheme (1) the members are divided into two classes, investors or creditors, and borrowers or debtors; (2) the profits are derived solely from the interest account, and (3) *no loan* can be made except upon a usurious basis.

The lowest rate of premium is 50 per cent. In the case of a loan to a stockholder on this basis he would have the use of \$1,000 for 1 month, \$990 for the next month, and so on to the 100th month, during which he would have the use of \$10, or in all the equivalent of \$50,500 for 1 month, and of \$505 for 100 months; this would be the real substance of the transaction.

"Premium" is to be considered as interest and to the extent it exceeds the lawful rate, usurious. 58 Md., 569.

Interest being a charge for the use of money, the length of time over which the charge is to extend should be regulated by the length of time for which the use of the money is actually had. At 6 per cent. the interest for 1 year would be \$30.30, and for 1 month, \$2.52½; even at 10 per cent., the highest lawful rate, the interest for one year would be \$50.50, and for one month, \$4.20½. The constitution exacts \$5 per month and \$60 for the year, which is at the rate of 12 per cent., or 2 per cent. in excess of the highest lawful rate.

But Kleindienst's engagement with the association was not to pay 50 per cent. "premium," but 135 per cent. While

getting exactly the same benefit in the way of the use of money, he became by the "contract" subjected to nearly three times the burden of a fellow member who obtained like advances at the lowest rate.

Through the requirement of a repayment of the one hundredth part monthly of the \$3,000 lent him, the actual benefit to him in the transaction was the use of three times \$505, or \$1515, for 100 months; at 6 per cent. the interest on this would be \$7.57½ per month, which, multiplied by 100, gives \$757.50 as the lawful charge for interest against him. At 10 per cent. it would be \$1,262.50, yet his engagement under the scheme of the "contract" demanded the payment on account of interest alone for this time of the enormous sum of \$4,050 (\$486 per annum, a rate of more than 32 per cent.), a clear excess of \$3,292.50 over the sum demandable at 6 per cent., and of \$2,787.50 over the sum demandable at 10 per cent., the highest lawful rate.

It is familiar law that upon the repayment of any part of a loan, interest upon the part so repaid must cease, but under the "contract" in this case, although there is a constant reduction monthly of the principal, and at the end of fifty months the borrower has repaid half of it, yet there is no reduction in the monthly payment of interest. If this is a valid arrangement, then an arrangement would be equally valid which required the payment of one-fiftieth part of each monthly, or one which required the repayment of the loan in one-fiftieth parts monthly and the premium in one one-hundreth parts monthly. They stand upon the same principle.

In the delusive inducements held out in the summary of advantages of membership in this association printed with the constitution under the title "Plan of the Association," the period of six years is indicated as the shortest period of time in which the borrower can, by monthly payments, pay his advance in full; and under Section 9 of Article 11 an

illustration is given of a settlement by a borrower at the end of forty-two months as follows :

Dr.

To cash on three shares.....	<u>\$3,000.00</u>
------------------------------	-------------------

Cr.

By forty-two one-hundredths of advance repaid,	
\$30 each.....	\$1,260.00
" 10 per cent. thereon.....	126.00
" 42 monthly payments on three shares.....	126.00
" 10 per cent. thereon.....	12.60
" Cash to balance.....	<u>1,475.40</u>
	3,000.00

Whether the borrower settles upon this basis at the end of forty-two months or escapes entirely at the end of six years, the association is largely a gainer by the usury exacted.

Take the case of a settlement at forty-two months of a loan on three shares, at 135 per cent. premium; the borrower has actually had the use (under the requirement of a return monthly of the one one-hundredth part of the principal), of \$2,385 for the time, interest on which, at 6 per cent. would be \$500.85 and at 10 per cent. \$834.75. The borrower has actually paid the association forty-two times \$40.50 for interest, amounting to \$1701, an excess over interest at 6 per cent. of \$1,200.15 and over interest at 10 per cent. of \$866.25.

To offset this imposition he is allowed 10 per cent. in gross, \$12.60 on his monthly payments of \$3.00 per month on his shares of stock for forty-two months, and he is also allowed 10 per cent. in gross, \$126.00, upon the amount of principal repaid, being \$30.00 per month for forty-two months, \$1260, a total aggregate benefit of \$138.60, which deducted from \$1200.15 leaves the association a gainer of

\$1,161.55 over a 6 per cent. rate; and deducted from \$866.25 leaves it a gainer of \$727 over a 10 per cent. rate.

If allowed to retire at the end of six years without further exaction, how would the case of a member stand, who had obtained a loan on similar terms?

He would have repaid to the association \$2,160.00 of the principal of \$3,000, being at the rate of \$30.00 per month for seventy-two months; and he would have paid for premium or interest at the rate of \$40.50 for the same period, \$2,916; he would have paid \$3.00 per month for forty-two months on his thirty-eight shares of stock, \$216, which added to amount paid for premium would make \$31.32 paid, exclusive of his payments on the principal.

If we take from this \$840, the amount of the principal, payment of which he seems to escape, he would have fully repaid the principal and a balance of \$22.92 would be left applicable to interest on the loan.

Compare this with interest on the nominal amount of the loan, \$3,000. For six years the interest at 6 per cent. would be \$1,080, and at 10 per cent. \$1,800, showing that he has paid \$1,212 in excess of interest at 6 per cent. and \$492 in excess of interest at 10 per centum.

This calculation is based, however, upon the assumption that the borrower has had the use of \$3,000 for six years. In point of fact (owing to his monthly repayments of principal) he has had the use of but \$1,935 for the time, on which interest at 6 per cent. would be \$696.60 and at 10 per cent. would be \$1,161. So that the association on the real substance of the transaction is a clear gainer at his expense of \$1,595.40 over a 6 per cent. rate, and of \$1,131 over a 10 per cent. rate, with the principal fully paid.

Comment is unnecessary on this showing. By no process of reasoning can the cloak of a lawful partnership be held to cover such an arrangement; usurious loans constitute the very essence of its existence.

This court held in the case of *Burns vs. Building Asso-*

ciation (3 Mackey, 333), that usury is involved "where there is an absolute undertaking binding the party to do a certain thing, namely, to pay back the principal of the loan, and whether by contract or some artifice to pay usurious interest."

In 84 Pa. St., 216, it was held that the contract of a married woman as a member of a building association could not be enforced, and in the same State it was held that an incorporated building association could not recover more upon its mortgages than the amount actually advanced with legal interest. 12 Phila., 250.

Endlich, in his work on Building Associations, devotes less than five of the 526 pages of the book to the subject of unincorporated building associations, the remainder is devoted to the consideration of questions affecting the nature and legal status of those which have the sanction of statutory authority for their existence. In Section 119 he says these statutes "*make a sweeping exception to many of the best settled rules of general policy applicable to dealings between man and man.*" In Section 337, after speaking of the blending of the elements of loan and partnership venture in the building association advance, he says: "*If the association is not proceeding under the protection of such express legislative sanction, the benefit of the doubt must be given to the individual seeking to escape an apparently exorbitant demand and against the association endeavoring to enforce a contract which partakes equally of two elements, one of which would render it lawful—the other unlawful.*" And in Section 356 he says that where "there is no statutory sanction at all within whose protection the society can bring itself and its contract, *there no theory of partnership dealings and no complication or veiling of the transaction will hold out to remove the fact of a substantial loan upon apparently extraordinary reservations.*"

MR. ANDREW C. BRADLEY for defendant:

The contract was not usurious, but even if it was, Section 716 of the Revised Statutes, relating to the District of

Columbia, precludes the complainants from setting up the fact in this action. *Carter vs. Carusi*, 112 U. S., 478.

Messrs. H. T. TAGGART and RANDOLPH COYLE, for complainants, in reply:

Section 716 does not apply to a case like the present. It applies to cases only where the usury is paid and received knowingly, and not to cases where it is paid by mistake or in ignorance.

Usury depends on intention, and it does not necessarily follow that the taking of greater interest than is allowed by law constitutes usury. *Duvall vs. Farmer's Bank*, 7 G. & J., 44.

Usury does not consist in merely intentionally taking a larger amount of interest than is allowed by law, but there must be superadded to such intent a corrupt design to charge more than the legal rate. *Duncan vs. Savings Institution*, 10 G. & J., 300.

Mr. Justice HAGNER delivered the opinion of the Court:

The first ground upon which the complainants insist the deeds of trust should be set aside, is that when they applied to the defendant company for the first loan, Mrs. Klein-dienst asked Callan, its treasurer, for a copy of the constitution of the association; whereupon Callan informed her that the supply was exhausted, but gave her a copy of the constitution of the Washington Co-operative Building and Deposit Association, the provisions of which, he said, were substantially the same as those of the defendant association; and the complainants assert they believed this representation to be true until recently, but have now learned to the contrary. The intimation is that the agent of the defendant association deceived the complainants into agreeing to come under relations with them, by representing its charter as more favorable for stockholders than it really was. This may be considered as a charge of deceit and fraud, and if sustained, might entitle the complainants to

relief from a contract thus fraudulently imposed upon them. The only proof on the subject is that of the complainant Mary, and if this were admissible, it is met by the positive denial on the part of Callan. He declares no such representation was ever made by him to Mrs. Kleindienst; that he was not the custodian of the copies of the constitution, and there was no difficulty in obtaining one from Reed, the secretary, whose business it was to keep them. The charge would be without any significance, unless it also appeared that the provisions of the defendant's charter were less favorable than those of the other association. But a comparison of the two discloses that in almost every particular the charter of the defendant association is the most favorable, and hence there could have been no injury to the complainants by the substitution of the one for the other, if it had taken place.

It appears, too, that the complainant had been associated with at least one building association before he became connected with the defendant association, and the loan of \$3,000 was obtained by him to pay that association a debt which must have been standing for some time. Twice he obtained loans from the defendant association, and one ground of complaint in the bill is that on a third occasion, when he applied to borrow money he was refused on insufficient grounds. That he should have remained from 1875 until 1885 in ignorance of the scheme of these societies, with which he seems to have been so extensively engaged, seems at least improbable.

Second. It is insisted the deed of trust of 1875, conveying the property standing in the name of Mrs. Kleindienst, is void, because it was executed to secure a bond signed by the husband and wife to pay the instalments required at the time of making the loan of \$3,000. It is argued that Mrs. Kleindienst, as a married woman, was not competent to sign a bond; that the bond being void as to her, was void *in toto*; and the bond being void, the deed of trust could be of no force. We conceive this contention to be

quite unfounded. In Bacon's Abridgement, "Obligation," (D) the law is thus stated :

"But if an infant, *feme covert*, monk, &c., who are disabled by law to contract and bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant."

The signature of a bond by a *feme covert* is analagous to the signature by an infant ; and there is no doubt that although the bond would be void as to the infant, yet a party jointly executing it with the infant remains bound.

So, where the bond is executed by one obligor under duress, it remains good as to the other party who signed it under no such duress. In 2 Greenleaf's Ev., Sec. 302, the law is thus stated : " But in all cases the duress must affect the party himself ; for if there be two obligors, one of whom executed the bond by duress, the other cannot take advantage of this to avoid the bond as to himself." Spalding *vs.* Crawford, 27 Tex., 159, is a case directly sustaining the text.

The bond, then, though void as to the wife, was valid as to the husband ; and being his debt, the wife had the power to secure its payment by a conveyance with her husband, of her real estate. Stephens *vs.* Beall, 22 Wall., 337.

This is not like the case of a deed executed to secure a note of the wife alone, which, of course, would be a totally void obligation, like a note given for an immoral or illegal purpose.

Third. The remaining defense is based upon the ground of usury. It is insisted the scheme of lending provided by the articles of association and actually carried out in the case before us, contemplates an usurious loan of money, and the return of the loan itself with the usury. This defense has repeatedly been in numerous cases brought before this court, where borrowers from such associations have endeavored to get clear of the onerous obligations they have incurred. The charters of these various associations seems

studiously to differ from each other in some particulars; but they all appear to be based upon the same theory which has been stated substantially thus: The members of such an association from time to time pay in their monthly dues as required by the terms of the charter. The association also makes profits from loans it may have made since it began operations, and thus at a certain time it will have a sum of money on hand which it is willing to lend out. An individual then joining it for the first time, applies for a loan of a portion of these accumulations. By becoming a member and punctually making the payments incident to his membership, he would, at the winding up of the association, be entitled to share in its accumulations and receive a sum in excess of all his payments. Thus holding a certain interest in the ultimate success of the association, conditioned upon his fulfillment of the duties of membership, if, instead of waiting for the realization of his profits upon the final settlement, he desires to anticipate that contemplated result, by obtaining from the society in advance an amount bearing a certain proportion to his interest, the requirements of strict mutuality would require him to pay to the society an amount of money, premium or bonus, not only commensurate with the advantages he may derive from the accommodation, but also in the nature of a contribution to the common treasury to indemnify those who competed with him for the loan, but failed to obtain it. The propriety of imposing this premium has been defended upon the ground that the association is after all in the nature of a co-partnership; and Endlich, in his work on Building Associations, Chapter 20, Sec. 517, says that an unincorporated association (like the present) is nothing more nor less than a co-partnership.

Whether the scheme of such association is a beneficial one to all the parties who embark in it, may well be questioned. To those who simply pay their dues, borrow nothing from the association, and await in silence the winding

up of the affair, it doubtless would prove profitable, provided the affairs had been honestly managed. And to those who borrow and pay their loans, it may, perhaps, be beneficial; but to those who borrow and fail to pay, the result must always be disastrous.

The principal decisions which have been referred to in this argument were cited in most of the cases in which this court has sustained the right of the building associations to exact a compliance with the contracts. But it is insisted by the complainants that the scheme of the defendant's association differs in vital respects from those of the association in the cases referred to. It is not necessary to go into a consideration of this contention, as we think a point presented by the defendant, which we shall now consider, is fatal to the claim of the complainants in this suit.

It appears that all the alleged payments of usurious interest were made by the complainants more than twelve months (the greater part of several years) before the filing of this bill; and it is insisted that under the authority of cases in the Supreme Court of the United States and of this court, the complainants cannot be allowed to avail themselves of the defense of usury in the present proceeding. Sections 713 and 714 of the Revised Statutes fix the rate of interest in the District of Columbia, and Section 715 declares that one contracting for a higher rate shall forfeit the whole of the interest. Section 716 provides that if any person or corporation within the District shall receive any greater amount than the rate of interest so provided by law, it shall be lawful for the person paying the same *to sue for and recover all the interest* paid upon such contract or agreement from the person receiving such unlawful interest, "but the suit to recover back such interest shall be brought *within one year after such unlawful interest shall have been paid or taken.*"

The Supreme Court, in *Barnett vs. National Bank*, 98 U. S., 555, and *Dryback vs. National Bank*, 104 U. S., 52, de-

cided that under a similar statutory provision applicable to the national banks, it was not competent for the borrower, after the expiration of the time limited in the statute for bringing the action, to reduce the claim of the bank by crediting the excess of interest as against the principal. In *Cook vs. Lillo*, 103 U. S., 792, the Supreme Court made a similar decision with reference to a statute of the State of Louisiana, which provided that if a person pays on a contract a higher rate of interest than the 8 per cent. authorized by the law of the State, the money paid for usurious interest may be sued for and recovered back within twelve months of the time of payment. It had been held by the court in Louisiana that a reclamation could not be made under the statute, nor the usurious interest be imputed to the principal, unless the suit for the recovery was begun, or the plea of usury set up to the claim, within twelve months after the payment was made. The Supreme Court, following these rulings, held that in a suit brought to recover a balance upon notes, the debtor was not entitled to any credit on the principal of his debt by reason of usurious interest paid, where his last payment was made more than twelve months before the suit was begun.

In *Walsh vs. Mayer*, 111 U. S., 31, the same statute was examined. There the maker of a note and mortgage, in his answer to a bill brought for the sale of the mortgaged property, claimed to credit upon the principal of his debt the usurious excess over the legal interest. But it appearing he had made all these payments to the lender more than a year before the commencement of the suit, the Supreme Court again held the statute conferred no authority to apply the usurious interest to the reduction of the principal, and that the exclusive remedy was an action brought within twelve months for the recovery of the money so paid.

In *Carter vs. Carusi*, 112 U. S., 478, the same ruling was made by the Supreme Court with reference to the statute of the District of Columbia, before referred to, affirming the

ruling of this court. Mr. Justice Woods, after restating generally the law as laid down in the foregoing cases, says: "The counsel for the plaintiffs in error contend that if he is not entitled to relief under the statute, his common law right to reclaim or set off usurious interest paid still remains to him. But this court has repeatedly decided against this contention of the plaintiff in error." In the case last cited (that of *Walsh vs. Mayer*), it was held generally that a statute which prescribes a legal rate of interest and forbids the taking of a higher rate, under penalty of a forfeiture of the entire interest, and declares that the party paying such higher rate of interest may recover it back by suit brought within twelve months, confers no authority to apply the usurious interest actually paid to the discharge of the principal debt, and that a suit for its recovery, brought within twelve months, was the exclusive remedy.

The same construction was put upon the District statute, in the case of *Eastwood vs. Kennedy*, 44 Maryland, 564, where a defendant attempted to set off against the principal debt the excess of usurious interest he claimed to have paid more than twelve months before the bringing of the action. All these were cases where the party relying upon the defense of usury was a defendant resisting the suit of the holder to enforce the collection of his claim, and therefore occupying a more favorable position than that of the complainants here, who are asking for affirmative relief.

It seems clear to us the complainants can have no relief upon this last ground.

The "Schedule A," prepared by the auditor, is more beneficial to the complainant than a statement would be, based upon either the ninth or tenth sections of the charter of the association. We think it makes all the allowance the complainants are entitled to, and we decide that the decree below directing the payment of the balance shown by that schedule, with interest, shall in all things be affirmed.

THE UNITED STATES

vs.

MARY J. McBRIDE AND JOHN W. McFARLAND.

1. It is too late to object for the first time to the manner of impaneling the jury after it has been impaneled and sworn.
2. It is a matter of discretion with the court whether it will direct the prosecution to elect on which count of an indictment it will proceed, and a refusal so to do is not reviewable.
3. It is sufficient to charge in an indictment that the defendant, "with the intent to injure and defraud a certain corporation, known as and called 'The President and Directors of the Fireman's Insurance Company of Washington and Georgetown,' did set on fire with intent to burn, and did burn a certain house (describing it) against the form of the statute," &c., without averring any insurance on or interest in the property by the company.
4. Objections to the sufficiency of the indictment, though in the discretion of the court so to do, ought not to be entertained during the trial of a cause, except on very urgent occasions.
5. The insurance company, which it was alleged the defendant intended to defraud by setting on fire the building on which the policy was issued, was described in the indictment as "The President and Directors of the Fireman's Insurance Company of Washington and Georgetown." *Held*, That this was a sufficient description, there being no evidence adduced to show its incorrectness.
6. It is not necessary in an indictment for violating Section 1151, R. S. D. C., to allege the ownership of the house which the defendant burned or attempted to burn. The offense created by that section is not the common-law crime of arson, and it is sufficient if the property is so described as to be capable of identification.
7. Where the bill of exceptions does not contain the evidence offered at the trial, the court cannot pass upon the correctness of a charge which involves an examination of the evidence to properly review.
8. Where a series of forty prayers were refused by the court, the fact that one of them which was unsegregated from the others contained a correct proposition of law affords no ground for a new trial when it appears that the judge's charge stated substantially the same proposition.

Criminal Docket. No. 16,808. Decided November 18, 1899.
The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

The defendant, McBride, was convicted upon an indictment found jointly against her and one McFarland, charging them, under Section 1151 R. S. D. C., with setting on fire and burning a certain house in the city of Washington.

The indictment contained four counts, and the defendants were convicted upon the third and fourth, having been found not guilty upon the first and second.

From the judgment of the Criminal Court the defendant McBride appealed and brought the case to the General Term on a bill of exceptions. McFarland abandoned his appeal. The facts of the case, so far as they are necessary to an understanding of the points decided, appear in the opinion of the court.

Messrs. WILLIAM S. FLIPPIN and W. C. WILLIAMSON for defendant McBride, appellant:

The charge is that she (McBride) maliciously and wilfully and with intent to injure and defraud a certain corporation, &c., did set fire with intent to burn a certain house, &c. The third count avers no ownership in any one; nor does it allege any facts showing how or in what way the Firemen's Insurance Company was injured or interested, or allege wherein the attempt to injure was manifested. The statute must be read in the light of the common law. See Cases, 29 Conn., 342 (under a State statute); see Rickman's Case, East P. C., 1034; 105 U. S., 580; 116 *Id.*, 55; 7 Peters, 138; 107 U. S., 655. Every ingredient of which the offense is comprised must be clearly and accurately set forth. 116 U. S., 55; 7 Peters, 138; 107 U. S., 655. To enable defendant to plead *autrefois convict* and *autrefois acquit*. Leach Co. Law, 261; 2 East P. C., 1034; *Id.*, Rex vs. Glandfield; *Id.*, Rex vs. Norton, 510; *Id.*, Rex vs. Clark, 55; *Id.*, 358; 4 Carr. & P., 579; 5 *Id.*, 201, and 16 Pick, 120.

The fourth count alleges McBride was in possession (but no owner is laid), yet she could not be guilty of arson at common law or under the statute (though guilty of a heinous offense), in burning the house, or in attempting to burn it *while in possession* of it. 5 Stew. & P., 175; 1 Leach, 218; 2 East P. C., 1025; 2 Johns., 105; East P. C., 1022; *Id.*, 218; 3 Blackfd., 485; Cro. Car., 376; 12 Conn., 487; 29 *Id.*, 342.

Moreover, in order to convict under these counts, it should

be averred (and proven) that the setting fire to and burning was done with the intent to injure and defraud the president and directors, &c., who had issued a policy on goods and chattels in the house aforesaid, which was burned, by reason of which the president and directors became liable to pay, &c.; to make out the statutory offense, all these averments are necessary.

The court erred in permitting evidence to go to the jury as to any insurance made by the Fireman's Insurance Company. The particulars leading to the crime must be laid and proven as laid. 2 Johns., 105; 12 Conn., 487; 9 Iowa, 436; Wharton Crim. Law, Vol. 2, Secs. 250, 1577, 1671; 3 Dutch., 323. Nor any other facts, unless averred in the indictment. See same cases. The more severe the punishment under the statute and the weightier the crime the more strict must be its interpretation. 3 Yerg., 278; 2 East P. C., 936; 4 Binney, 379; 9 Wend., 454.

"The court erred in not giving Mr. Clagett time, as requested, to consult his client, and in assigning, hastily, Mr. Closs to do detached and most important work, selecting a jury, and especially in swearing in a part of the panel out of twenty-three when twenty-six men should have been first offered, and in refusing to set aside the panel. The statutes, Sec. 856, R. S. D. C., provide: "If the jury is intended for service in the special term, sitting as a Criminal Court, the twenty-three persons whose names shall be first drawn shall constitute the grand jury, and the twenty-six persons whose names shall be next drawn shall constitute the petit jury for the term."

Mr. JOHN BLAIR HOGE, U. S. District Attorney for the United States:

Whatever objection, if any, was really urged below to the constitution of the jury, or the manner of impanelling it, it is submitted, cannot be repeated here. The record shows that none was made at the time the jury was sworn; no exception was taken; no point reserved. On the contrary, the jury was accepted as satisfactory to the defendants.

Compelling of an election pertains not to absolute law but to judicial discretion, the exercise of which is not subject to revision by a higher tribunal. 1 Bish. Crim. Proc., Secs. 424, 425, 457, and cases cited.

But, if subject to review, this case comes directly within the rule that a court will not interpose where the joining of counts is simply designed to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction. *United States vs. Beckford*, 4 Blatch., 337; *State vs. Bell*, 27 Md., 675; 1 Bishop Crim. Proc., Sec. 457 and notes; *People vs. Austin*, 1 Park C. R., 154; *Ros. Crim. Ev.*, *208.

The second and third exceptions may be considered together. They allege error, because the court refused to sustain the defendant's objection to the introduction of proof under the third and fourth counts of the indictment. The grounds of this objection appear to have been that there were no averments in these counts of an interest of the insurance company in the building burned; that there was no averment of an insurance upon the personal property contained in the house, and that there were "no sufficient grounds otherwise to authorize any proof whatever to sustain the averment that the burning was to defraud the insurance company."

Arson, like all other crimes, depends upon intent, and therefore it is competent to prove fraud against an owner or insurer as evidence of intent. The statute under which this inducement was found (R. S., D. C., Sec. 1151), defines the offense to be unlawful, malicious and fraudulent burning, and with intent to defraud any other person or body politic or corporate. It was therefore proper to allege this intent, precisely as in a forgery. As is well known in indictments for this last-named crime, the allegation is sufficient. The fraud itself, and the means of its perpetration, are shown by evidence and are never matter of averment. *Whart. Crim. Law*, 716, 739.

By 24 and 25 Victoria, Sec. 60, it is made sufficient in any indictment for arson to allege the intent to defraud, without alleging or proving intent to injure and defraud any particular person. To prove that the act was done simply with intent to defraud is sufficient. The statute here does not go to this extent; it imposes nothing beyond the requirement that intent to defraud some person, natural or artificial, must be alleged; but the means by which it is carried into execution need not be averred, but is left to be shown by proof. See 2 Bish. Crim. Proc., Sec. 45; Whart. Crim. Law, Sec. 843; Bish. Do. Forms, Secs. 845, 846.

In *United States vs. Amedy*, 11 Wheat., 638, which was upon indictment for destroying a vessel with intent to defraud underwriters, the Supreme Court approved an instruction in the court below, "that it was not material whether the company was incorporated or not; that it was not material whether the policy was valid or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had willfully and corruptly cast away the vessel with intent to injure the underwriters."

If, however, it be necessary to discuss the objection to the sufficiency of the description of the insurance company—as a body corporate—the reply is found in points frequently settled by the courts. See 24 Ohio, 462; 29 California, 257.

But, it is submitted, this court cannot pass intelligently upon the questions presented by the defendant's exception to the refusal by the court to give these instructions. If the evidence before the jury was not such as to make them relevant it was manifestly proper to reject them. An appellate court must be sufficiently in possession of the evidence given below to determine this question of relevancy. 59 Wis., 55.

The record here, neither in the bill of exceptions nor

elsewhere, exhibits the evidence to which many of the instructions were meant to apply.

"It is impossible," said the Supreme Court, in a case involving this question, "upon a record like this that we should know whether the charge is correct or erroneous, or whether the refusals to charge as requested were justified or whether they were improper." *Reed vs. Gardner*, 17 Wall., 411; *Jones vs. Buckell*, 104 U. S., 554.

Mr. Justice HAGNER delivered the opinion of the Court.

This case has been argued with great earnestness, all the more commendable because it is understood the appearance of counsel for the traverser was merely a charitable act upon their part. We have examined from beginning to end, in the most painstaking way, not only those points which were properly before us upon this appeal, but all others presented in the argument, although many of them are matters, strictly speaking, we were not called upon to consider. We are not sitting here dispensing private justice with power to reverse a criminal conviction from feelings of pity. The public justice of the United States with which we are concerned, is to be administered according to fixed legal rules, which the courts are not at liberty to disregard or change at their will.

In September, 1887, Mary McBride and John W. McFarland were indicted for a violation of Section 1151 of the Revised Statutes of the District of Columbia. That part of the section involved here, punishes an individual who shall set on fire or burn, or attempt to set on fire or burn, any house or out-house in the District, with the intent to injure or defraud any other person or body politic or corporate. In the Criminal Court, at that term, objections were filed to the indictment, which were heard and overruled, and the parties then pleaded not guilty and the case was postponed to the designated day in October. On that day the trial began, proceeded for five days, when one of the jurors died, and the case was then continued until the next term.

In June, 1888, it was again called for hearing, two years after the alleged firing. The result of that trial was that McFarland was found guilty and was sent to the penitentiary.

McBride also was found guilty and sentenced, but she moved for a new trial, and that motion is here upon exceptions.

The first objections urged at the argument relate to alleged irregularities in the impaneling of the jury. The circumstances out of which they arose are thus set forth in the bill of exceptions:

"The June, 1888, term of this court opened on Monday, June 18, 1888, at 10 o'clock, a. m.

"This cause was called. Both defendants were present. The counsel for defendant McBride, Van H. Manning, Esq., stated that his client had no attorney to attend to the details of the case and to assist him at the trial, and asked for postponement, which the court denied.

"The court then assigned Howard C. Clagett as such attorney to assist Mr. Manning.

"Mr. Manning then asked that the case stand over until next morning because Mr. Clagett could not be in court until that time, which request was denied by the court and F. P. Closs, Esq., was requested by the court to assist or look after the impaneling of the jury in behalf of defendant McBride, which service Mr. Closs then and there accepted.

"The list of petit jurors who had been drawn for the term was then called, and twenty-three responded and the impaneling of a jury for the trial of the cause proceeded. Twelve of the jurors so drawn were called to the box. The prosecution and each defendant challenged several, so that early in the day the list (the twenty-three so responding), was exhausted and an extra list of thirty was ordered drawn and summoned.

"The thirty names were drawn and the officers proceeded to summon them to appear forthwith.

"Nine were summoned and appeared one at a time.

"As each juror so summoned appeared the impaneling proceeded until the list of nine so responding was exhausted, upon which the court ordered a talesman to be summoned. Such talesman was so summoned, *accepted by both parties*, and the panel being then completed, the jury were sworn.

"All the preceding proceedings were had *without objection*.

"Immediately upon the jury being so sworn the court adjourned until next morning.

"When the jury was so sworn it was composed of eight of the original twenty-three, three of the nine, and the one talesman.

"When the court opened on Tuesday morning Mr. Claggett and Mr. Manning appeared to represent defendant McBride, at which time Mr. Claggett remarked that he 'desired to except to the manner of impaneling the jury, there not having been a full panel present when such impaneling began' to which remark the court replied, in substance, that there seemed to be nothing for the consideration of the court, and the trial would proceed."

The record contains no further reference to the notice given by Mr. Claggett of his desire to except, and it is insisted by the District Attorney that it was not acted on, and the purpose to except was abandoned. We have, nevertheless, examined it, and entertain no doubt the ruling of the court below was correct.

The objection belongs to the class that should be availed of by a challenge to the array. Bishop, Vol. I, Sec. 876, says that a challenge is either to the array or to the polls. "The former is taken when there is some objection affecting the legal constitution of the entire panel; the latter when there is some individual disqualification attaching to the particular juror. The regular time and manner of objecting to a juror, or to the collective body, is by challenge while the trial panel is being made up. It should be done before the

jury is sworn." 1 Bish. Crim. Proc., Sec. 932 *a*. That such an objection may be waived by a defendant, if the cause is known to him at the time the objection should properly be presented, is well settled. That the irregularity relied on was known to the counsel from the commencement of the trial is undoubted, for the record expressly states that every step took place in the presence of all the parties, and that all the proceedings "were had without objection." The completion of the jury was effected by the swearing of one talesman, who "was accepted by both parties."

In 1 Bishop's Crim. Proc., Secs. 117-119, the familiar principle governing this subject is thus discussed, Sec. 118: "If the defendant has consented to any step in the proceedings; or if it has been taken at his request, or he did not object to it at the proper time, when he might, he cannot afterward complain of it, however contrary it was to his constitutional, statutory or common law rights. In judicial proceedings this doctrine of waiver is a necessity, for without it they would rarely be carried on with success."

The qualification of the general doctrine, as stated by the author, does not extricate this case from these sensible general rules. In Section 932 it is said, "A defendant, if he chooses may waive objections to the selecting of the jury, or to individual jurors, and agree to be tried by such as are put upon him; and if, while the panel is being made up and sworn for his trial, he knows of a cause of challenge and does not take it, he cannot avail himself of the defect afterwards."

In *People vs. Scott*, 56 Michigan, 154, the defendant after conviction of a felony, moved for a new trial upon the ground that one of the jurors was an unnaturalized foreigner. Cooley, C. J., speaking for the court in overruling the motion, said there was no showing that the fact had come to the knowledge of the defendant subsequent to the impaneling of the jury, and no reason given for not taking the objection to the juror by way of challenge before he was sworn—that the

trial court is the proper and suitable tribunal for determining the qualification of jurors, upon challenges on which the court must judicially pass—that whether made or not, the court in finally accepting and impaneling the jury, judicially determines that the several members are competent; that the party has then had all his rights as to that matter preserved to him, and any allegation that any one of the jurors is incompetent, except as it may be based on exception taken to the overruling of a challenge, is an allegation against an adjudged fact. In *Reynolds vs. United States*, 98 U. S., 158, the Supreme Court held that a prisoner will be held to have waived his constitutional right to be confronted with the witnesses against him if, in his presence, it is alleged they have been kept away by his procurement, and he makes no effort to deny the charge.

We have no intention of deciding that the objection to the competency of the jury was well taken; but it is sufficient to say that all grounds of objection upon that ground were effectually waived by the defendant at the trial, and we are not at liberty to re-examine them here.

Immediately after the opening statements had been made by the counsel for the prosecution and for McBride, respectively, and before any testimony was offered, Mr. Clagett asked the court to direct the prosecution to elect on which count they would proceed and ask a conviction, which request was denied by the court, and to such denial counsel for McBride excepted.

There can be no doubt the determination of that motion is a matter in the discretion of the trial court. 1 Bishop's *Crim. Proc.*, Sec. 425. Its refusal to compel an election is, therefore, not reviewable here. The next point is thus stated:

"During the trial, counsel for defendant McBride objected to any proof under the third and fourth counts of the indictment, because there was no averment in the indictment of any interest in the insurance company in the building

mentioned in the indictment, and claimed to have been burned, and on the further ground that there was no averment as to the existence of any insurance of any personal property, goods or chattels contained in the house, and no sufficient grounds otherwise to authorize any proof whatever to sustain the averment that the burning was to defraud the insurance company. But the presiding justice overruled the said objection, and allowed proof to be offered of an insurance by the company named in the indictment of personal property, goods and chattels in the house burned, to which ruling the defendant McBride excepted." The indictment sets forth, in the third count (upon which there was a verdict of guilty), that the defendant, "with the intent to injure and defraud a certain corporation, known as and called 'The President and Directors of the Firemen's Insurance Company of Washington and Georgetown,' did set on fire with intent to burn, and did burn a certain house (describing it), against the form of the statute," &c.

We have examined the indictments based upon statutes like this, and find they are precisely the same in the particular complained of as that before us.

In Bishop's Directions and Forms, section 184, an indictment is given, based upon the 43d Geo. III, Ch. 58, section 1, by which it was made a felony to set fire to any house "with intent thereby to injure or defraud his majesty or any subject, 'or any body corporate.'" This form contains no allegation of the existence of a policy of insurance by the company named, or of any interest on its part in the building burned, but simply avers it was set on fire "with intent thereby to injure and defraud the London Insurance Company, against the peace," &c.

So in section 185 it is said that "an indictment under a Connecticut statute, making it felony in every owner or tenant of any building who shall willfully burn it, or anything therein, with intent to defraud another, will be good, which alleged the burning, 'with intent thereby to defraud

the Republic Fire Insurance Company against' &c," without any averment of an insurance by the company.

Upon these authorities and the general principles of criminal pleading, we think the form of indictment used in this case is sufficient in the particular complained of.

Four other objections to the indictment have been urged before us. Before the trial began objections to the indictment had already been made by special pleas, which had been overruled after argument, and the defendants were placed on trial. Can these objections be properly renewed during the trial, after they had been already decided before it began?

In *United States vs. Gooding*, 12 Wheaton, 460, this question was presented, though in a somewhat different form. There no demurrer or plea had been interposed; but after testimony had been introduced the defendant's counsel asked the trial court to declare that certain counts in the indictment were insufficient; and the judges being divided in opinion, the propriety of the request was certified to the Supreme Court. Mr. Justice Story, speaking for that court, said: "It only remains to consider the point whether these objections to the sufficiency of the indictment could be properly taken at this stage of the proceedings. Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrer to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objection should be discussed or decided during the trial of the facts by the jury. It would be very inconvenient and embarrassing to allow a discussion of such topics during the progress of the cause before the jury, and introduce much confusion into the administration of public justice.

"But we think it is not wholly incompetent for the court to

entertain such questions during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature. The Circuit Court in the present case did allow the introduction and discussion of these questions during the trial, and were divided upon the propriety of the practice. We can only certify that the court possessed the authority, but that it ought not to be exercised except on very urgent occasions."

Nothing appears in the present case to show that the court did not overrule the objections because they were interposed after the testimony had closed, or because they had already been decided after full hearing, and that decision stood as the law of the case. But we have examined all the objections that have been made to the indictment at the hearing, although several of them do not appear in any way in the record itself. One of them is that the insurance company is not properly described in the indictment. It is stated in the third and fourth counts that the setting on fire and burning was committed to injure and defraud a certain corporation, known as and called the "President and Directors of the Firemen's Insurance Company of Washington and Georgetown." The objection is here made that this is not a sufficient description of the company; that it should be stated that it was incorporated under a certain act of Congress, and that the indictment should set forth the names of the different persons constituting the officers of the company. The authorities already alluded to show the form used here must be held sufficient until evidence has been adduced to show its incorrectness, and nothing of the kind appears in the record.

Then it is contended the third and fourth counts are defective, because they do not state the ownership of the property set on fire. The third count states "that Mary J. McBride and the said John W. McFarland, maliciously and willfully, and with intent to injure and defraud a certain corporation "called," &c., "did set on fire with intent to

burn and did burn a certain house, situate in the city of Washington, in said District, commonly known as and called house No. 515 Eleventh street northwest, against the form of the statute," &c.

The fourth count is in the same form as the third, except that it also says, "which said house was then and there in the possession of the said Mary J. McBride."

This averment, it is insisted, is insufficient because it does not state that the house belonged to another person and not to the defendant; since it is not arson for a person to set fire to his own house, and hence such a negation is requisite to show that the defendants had committed a crime. There can be no doubt that at common law arson consisted only in the burning of the dwelling house of another. But this indictment is not founded on the common law of arson at all, but upon Section 1151 of the Revised Statutes of this District. This section is composed of two statutes passed by Congress, and specially applicable to this District. The first was the Act of 1831, Sec. 3, Ch. 37, 4 Stats., 448, which is reproduced in Section 1157, except as modified by the Act of 1852, Ch. 55.

Section 3 of the Act of 1831 was as follows: "Every person duly convicted of the crime of maliciously, willfully, or fraudulently burning any dwelling house or any other house barn, or stable adjoining thereto, or any store, barn, or out-house, having goods, tobacco, hay, or grain therein, although the same shall not be adjoining to any dwelling house, or of maliciously and willfully burning any of the public buildings in the cities, towns or counties of the District of Columbia, belonging to the United States, or the said cities, towns or counties, or any church, meeting house, or other building for public worship, belonging to any voluntary society or body corporate," &c., "shall be sentenced," &c.

This was a departure from the common law definition of arson, and punished the burning of buildings not dwellings

or parcels thereof, and omitted the ingredient of the common law offense, which required that the buildings burned should be the property of another. Then came the Act of 1852, Ch. 581, 10 Stats., 13, the preamble of which recited that whereas it had been represented that so much of the Act of 1831 as provided a punishment for the burning of stores, barns or out-houses, not adjoining a dwelling house, has been construed to apply to the burning of such houses only when they contained merchandise, tobacco, goods, &c., whereby offenders have escaped punishment for burning buildings in which none of such articles are kept. It was then enacted that thereafter if any person shall maliciously, willfully, or fraudulently, and with intent to injure or defraud any other person or persons or body politic or corporate, burn or set on fire with intent to burn, or attempt to set on fire or burn, any house or out-house in the District of Columbia, whether the same be finished or in process of erection, though the said house or out-house shall not, at the time of such setting on fire or attempting to set on fire or burn, have any goods, tobacco, hay, and so forth, therein, nor be adjoining to any dwelling house, or be occupied for any purpose whatever," should be punished, &c.

This latter act now merged in Section 1152, R. S. D. C., not only corrected the defect pointed out in the preamble, but it also punished, for the first time, the attempt to set on fire or burn, neither of which constitute arson at the common law, and this statute also omitted the common law requirement that the house should belong to another person than the accused.

Section 1152, as it now stands, differs in all the essential particulars we have pointed out from the common law offense; and it is evident it describes a series of new offenses, specially created by the Legislature, quite independent of and uncontrolled by the discriminations and requirements necessary in the common law indictment for arson; and among other averments which no longer were necessary

or proper in an indictment under this section was that of the ownership being in another. The language of the new law was broad enough to punish one for setting fire to his own house, as well as the house of another. Of course, in the former case it would no longer be necessary to aver in the indictment the ownership of the property, except as such description might be needful to its identification, to defeat a second prosecution after a verdict of acquittal or conviction. The other reason, that the absence of the averment would have left the charge of the offense faulty and incomplete, ceased to have application to the description of the new crime created by the statute.

The third and fourth counts of this indictment, each described the premises as "commonly known and called house number 515 11th street, northwest;" a description incapable of being misunderstood or confounded with any other property in the city and District.

The fourth count added the further circumstance of location, "which said house was then and there in the possession of the said Mary J. McBride." It is impossible to suppose that a second prosecution for the offense of setting fire to this same house on the 30th of June, 1886, by either of these defendants, would be allowed by any court to proceed upon the presentation of the present record. Upon principle, we think the description should be held to be sufficient, and that, too, should be the ruling upon the authorities.

A statute of New York declared that arson in the first degree should consist of any willful setting fire to or burning in the night-time of a dwelling house in which there shall be at the time some human being, and that every house, prison, jail or other edifice, which had been so occupied by persons lodging therein at night should be deemed a dwelling house of any person so lodging therein. The statute was under consideration in *Shepherd vs. Pepper*, 19 N. Y., 538. The defendant Shepherd owned a house, the

lower part of which Geyer occupied as a shop and bedroom, and he was sleeping in the room when the fire occurred. Shepherd, the owner of the house, was indicted for setting fire to the dwelling house which was described as the house of Geyer. Judge Denio, delivering the opinion of the court, at great length, held that the legislature, in adopting this provision of the Revised Code, intended to create a new offense differing from arson at common law, and therefore omitted all reference to the question of ownership, and introduced features not appropriate to the description of the common law offense, namely, that the burning should be at night and that some living person should be in the building at the time; that the statute contained an enumeration of all the necessary constituents of the new offense, and it sustained the indictment and held that the burning of his own house, by the owner, was within the terms and intent of the statute. On the same reasoning the purpose of Congress to create a new offense by the Acts of 1831 and 1852 is equally clear. The new offense was the setting on fire, or attempting to set fire to *any* dwelling or other building, whether adjoining or not, and whether containing goods, grain, &c., or empty, or with intent to injure or defraud any person or body corporate. "Any" dwelling is certainly comprehensive enough to include the house occupied by or in the possession of a tenant.

To the same effect was the case of the *People vs. Shainwald*, 51 California, 568. There the indictment charged that the building set on fire by the defendant belonged to Pierce and others, being the same building that in August and September, 1875, had been occupied by Van Arsdale & Company as a store. At the trial there was no proof at all that Pierce and others owned the building; but there was evidence that at the time alleged Van Arsdale & Company did occupy it, but that the defendant had been appointed receiver, and as such, for some time before the burning, had possession of the store and goods. The

defendant was convicted and brought up the case on exceptions. On appeal the court held it was not necessary to prove the ownership, as the prosecution had proved that the house had been used and occupied as alleged; that whether it was the property of Pierce and others, as alleged, was immaterial, as their ownership, if proven as alleged in the indictment, would only further identify the house, which had already been otherwise sufficiently identified.

This was a decision that the offense there charged, "burning a store," not being arson at common law, the statutory offense would be sufficiently described without the common law strictness of averment and proof as to the ownership.

So in *Ersine vs. Com.*, 8 Grat., 624, the indictment charged that Ersine maliciously set fire to and burnt a building on his own farm in Ohio County, Va., "which then and there was in the occupation and possession of Eli Prettyman." Section 7 of the Act of 1847, under which the indictment was found, punished any free person who should maliciously burn *any building whatsoever*. The previous sections had punished the burning of dwellings, &c., and the only departure from the common law in the seventh section appeared to be that the building therein referred to need not be a dwelling or adjacent thereto. But the court of appeals held the description sufficient, and that a party might be punished under Section 7 for burning his own house, then in the legal occupancy of another.

To this objection, as to several others insisted on at the hearing, a satisfactory reply would be made by reference to Section 1025 of the Revised Statutes of the United States. "No indictment found and presented by a grand jury in any district or circuit, or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The counsel for McBride then asked the court to give sundry instructions, which are incorporated in the bill of exceptions under the head of Exhibits A and B. Exhibit A contains three "chapters" of proposed instructions; each "chapter" presents a variety of propositions, twenty in number. Exhibit B, with not so many chapters; also contains twenty prayers. The court granted the fourth, fifth, eighth and ninth prayers of Chapter 3, Exhibit A, and nineteen and twenty of Chapter B, and refused the others, to which rulings exceptions were taken. The court then gave its own charge, set forth as Exhibit C, and in addition gave some additional instructions as to the presumption of innocence. We have examined all these propositions with great care. Chapter 1 of Exhibit A, is founded on a misconception of the statute. The defendant's counsel insist that the charge of an attempt to burn a house with intent to injure or defraud is not properly within the meaning of the statute, because it is not alleged in the indictment that this house was a dwelling, or that it did not contain any goods, tobacco, hay, or grain, since Congress only meant to punish an attempt to burn a dwelling house or a building which at the time contained any grain, oats, tobacco, hay, and so forth. This contention is so utterly at variance with a proper reading of the statute, that it is not necessary to consume more time in its consideration than to say it is entirely unfounded. As all the other prayers in Exhibit A refer to the first and second counts of the indictment, upon which the defendants were acquitted, the defendants could not have been injured by the ruling, and they cannot, therefore, be considered on appeal.

The second "chapter" of Exhibit A contains a number of propositions it would have been highly improper for the court to grant to the jury, because manifestly tending to mislead them without benefit to the accused. Some contain principles plainly erroneous, and the correctness of others is more than doubtful; but they were correctly disposed

of by the judge in his charge; and therefore cannot be availed of here. It would be very easy to expose their error, but it would not be worth the effort.

In chapter 3, the prayers presented relate to the question of proof. I will refer for an illustration to the first. "The charge contained in the indictment in both counts consists, first, of the averment of burning or setting fire" to the house in question; "of doing this with the purpose of injuring or defrauding" the president and directors of the Firemen's Insurance Company of Washington and Georgetown. These averments are essential and cannot be dispensed with; nor can their truth be presumed nor conjectured, but being made by the United States must be proved by it. The defendants are not charged in the indictment with conspiring to burn, but with the act of burning, and testimony tending to prove a conspiracy is not sufficient to convict upon this charge."

There is nothing in the record to show one word of testimony on the subject of conspiracy. In fact, the record contains no statement of the evidence in the case at all. The justice states that the Government gave evidence fairly tending to establish the case as alleged in the indictment, and that the defendant also gave evidence fairly tending to prove that they were innocent of the charge preferred. Beyond this statement we cannot rely for information as to what proof was offered upon oral declarations of counsel.

In *Reed vs. Gardner*, 17 Wallace, 411, the court say: "It has been frequently held by this court that in passing upon the questions presented in a bill of exceptions it will not look beyond the bill itself. It is impossible, upon a record such as this is, that we should know whether the charge is correct or erroneous, or whether the refusals to charge as requested were justified, or whether they were improper."

In 104 U. S., 555, the court declined to pass upon the charge below where the bill of exceptions does not set forth the evidence.

We think one in the defendant's series of forty prayers, not noticed by the court, should have been granted; as follows: "The credibility of witnesses must be determined by the jury, but in doing this it will be proper for the jury to consider their manner of testifying, their relations to the parties, if any, the nature and consistency of their statements, as well as their opportunities for observation and capacity to notice and remember the facts stated by them."

But although this was correct, it was one offered as a series, which contained many propositions plainly "exceptionable" and therefore the entire series was properly refused by the court (*Indianapolis vs. Horst*, 3 Otto, 295); and the omission to segregate the prayer from its faulty surroundings, cannot justify us in disturbing the verdict below. Besides, substantially the same idea was presented by the justice in his charge.

We have gone through this record in a painstaking way, that the defendant may realize that every possible objection presented by her counsel has been carefully considered.

Upon this examination, finding no error in the ruling below, we overrule the motion for a new trial.

IN RE ESTATE OF ANASTASIA PATTEN.

1. The proceedings authorized by Sec. 6, Subch. 6, of the Maryland Act of 1798, when an executor or administrator fails to return an inventory of the estate within three months after the date of his letters applies only to the ordinary inventory provided for by the act and not to any special inventory that may be ordered by the court.
2. When a special inventory has been ordered the court may extend the time for returning such inventory.
3. The provisions of Sec. 6, Subch. 6 of the Act of 1798, are not to be rigorously construed against an executor who has failed to return an inventory within the time prescribed by the act, but an extension of time should be granted where satisfactory reasons for so doing are shown to the court, especially when it appears that no damage has resulted to any one from the delay.
4. So when an executor has failed to join with his co-executors in the return of the inventory or to return any other within three months, as prescribed by the act, the time may be extended by the court, and this although such excuse be not presented until more than two months after the filing of the inventory by the other executors.
5. An executor or administrator can only be removed by the court for legal and specific causes and after citation and an opportunity to be heard.
6. Technical rules of pleading and practice are not to be applied between parties in the Orphans' Court.
7. On a motion by co-executrices to remove one of their number from her office on the ground of failure to join with them in their inventory or to file one of her own within the time prescribed by the Act of 1798: *Held*, That the reasons given by the respondent, viz., sickness and the refusal on the part of the other executrices to exhibit to her evidences of claims made by them in the inventory, constituted a sufficient excuse for such failure, although such excuse was not given the court until more than two months had elapsed since the filing by the other executrices of their inventory.

Orphans' Court. No. 3234. Decided November 18, 1889.
The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

MOTION in the Orphans' Court by co-executrices to have one of their number removed from her office because of failure to join with them in the inventory or to file one of her own within three months from the date of the letters testamentary. Certified to be heard in the General Term in the first instance.

THE FACTS appear in the opinion.

Mr. H. E. DAVIS for the motion.

Mr. J. M. WILSON *contra*.

Mr. Justice HAGNER delivered the opinion of the Court:

A very interesting question has been presented to the court, arising out of a controversy between four of the daughters of the late Mrs. Anastasia Patten and the oldest daughter, Mrs. Glover. The five daughters were appointed the executrices by the last will and testament of their mother, and letters testamentary were confided to them all by the Orphans' Court on January 14, 1889. On the 27th of April following, the four unmarried daughters filed an inventory of the estate, in which Mrs. Glover did not unite. On the 28th day of June, two months and two days afterwards, an application was made to the justice holding the Orphans' Court, by the four executrices who had returned the inventory, for an order excluding Mrs. Augusta Patten Glover from taking any part in the administration of the estate of her mother, because she had made no return of an inventory. This application was based upon the provisions of section 14, subchapter 6, of the testamentary law of Maryland of 1798, chapter 101, which reads as follows:

"If there be more than one executor or administrator named in the letters, any one or more of them, on the neglect of the rest, may return an inventory, and the executor or administrator so neglecting shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator so returning shall thereafter have the whole administration, unless, within two months after the return, the delinquent or delinquents shall assign to the court some reasonable excuse which it shall deem satisfactory."

The application, which was filed at the first session of the Orphans' Court occurring after the expiration of two months from the filing of the inventory by the unmarried

daughters, was in this form: "Come now Mary E. Patten, Josephine A. Patten, Edith A. Patten, and Helen Patten, executrices of Anastasia Patten, deceased, by their counsel, and move the court to adjudge and order that Augusta Patten Glover, heretofore appointed and qualified as co-executrix of the said executrices, shall not hereafter interfere with the estate of the said deceased or have any power over the personal estate of the said deceased, but that the executrices aforesaid, moving herein, shall henceforth have the whole administration of the said estate, because on the 27th day of April, A. D. 1889, they duly returned an inventory of the said estate and the said Augusta Patten Glover neglected so to do and has not returned any other or different inventory in lieu thereof, and did not within two months after the return of the said inventory assign to the court any reasonable excuse in the premises, which it deemed satisfactory."

The justice, on the same day, passed an order which, after reciting the application, "adjudged and ordered that the said Augusta Patten Glover shall not hereafter interfere with the administration of the estate of the said deceased; but that the said Mary E. Patten, Josephine A. Patten, Edith A. Patten and Helen Patten shall hereafter have the whole administration of the estate of the said deceased aforesaid; unless, however, cause to the contrary hereof be shown by the said Augusta Patten Glover on or before the 5th day of July next; and provided that a copy hereof be served upon her on or before the 1st day of July next."

Mrs. Glover filed an answer, showing cause why the order should not be made final, and the justice holding the Orphans' Court, on the 13th day of August, passed the following order:

"The court having, on the 28th day of June, A. D. 1889, on motion of Mary E. Patten, Josephine A. Patten, Edith A. Patten and Helen Patten, executrices of the last will and testament of the said deceased, adjudged and ordered that

Augusta Patten Glover should not thereafter interfere with the administration of the estate of the said deceased, or have any power over the personal estate of the said deceased, but that the said Mary E. Patten, Josephine A. Patten, Edith A. Patten and Helen Patten should thereafter have the whole administration of the said estate, unless cause to the contrary could be shown by the said Augusta Patten Glover; and the said Augusta Patten Glover having, on the 8th day of July, A. D. 1889, filed an answer to the said adjudication and order purporting to show cause as aforesaid, and the said motion, adjudication, order and answer being now under consideration by the court, it is, this 13th day of August, A. D. 1889, by the court, ordered that the same be heard by the court at a General Term in the first instance."

Under that reference the matter is presented for our consideration.

It has been insisted by the petitioners that the mere fact that an inventory was not returned by Mrs. Glover within the two months after the filing of the inventory by the unmarried daughters, was fatal to the right of the delinquent executrix to interfere further in the estate, and that the court was without authority to consider any excuse the delinquent might assign after the expiration of that time; that the legislature had, in effect, declared such neglect in itself should work a forfeiture of her right, and nothing could be heard in extenuation or explanation, unless presented to the court within the period so limited in the act. On the other hand, it is contended that this is not a mandatory provision enforcing itself, or to be enforced in every event, but should be considered as directory and not intended to deprive the court of authority to excuse a compliance with the requirements of the section, if satisfactory reasons are presented, even after the expiration of the two months.

To a full understanding of the case it is necessary the

facts should be somewhat gone into. The will was filed in September, 1888. In December, Josephine A. Patten, one of the petitioners, for some reason not appearing here, was appointed administratrix *ad colligendum*; on the 14th day of January, 1889, letters testamentary were issued to the five daughters; on the 25th of that month the collector returned an inventory of the estate, and on the next day filed her account. In the same month exceptions to this account were filed by Mrs. Glover, and a motion was made by the four unmarried daughters to strike the exception of Mrs. Glover from the files. Afterwards, on the 8th of February, an order was passed reciting that "the collector of the above-named estate having filed an inventory and appraisement thereof, and exceptions to the same, with a schedule of undervaluations, having been filed on behalf of Augusta P. Glover, one of the legatees and executrices of said estate, upon the ground of incompleteness and undervaluation; and a motion to strike out the said exceptions and schedule having been filed on behalf of Mary E. Patten, Josephine A. Patten, Edith A. Patten and Helen Patten, the other legatees and executrices of the said estate; and it appearing to the court from the receipts thereof on file that all and singular the personal property mentioned in the said collector's inventory has been delivered to and receipted for by all the said executrices, it is this 8th day of February, A. D. 1889, on the motion of the solicitor for the said Augusta P. Glover, and without objection on the part of the solicitor of the said Mary E., Josephine A., Edith A., and Helen Patten, now present in court, after due notice of said motion: *Ordered*, that the said exceptions and schedule and the motion relating thereto, as well as the account stated on the basis of said inventory and appraisement, may be withdrawn from the files of the court, and that a new inventory of all and singular the personal property of the said deceased be made by the executrices of the said estate, and four persons therein named hereby are appointed appraisers to make a new appraisement on the said new inventory."

Section 11 of subchapter 6, of Ch. CI of the Act of 1798, is in these words:

"In case an inventory be returned by a collector, duly appointed, the executor, executrix, or executors, or administrator, administratrix, or administrators, thereafter administering, shall, within three calendar months after the date of his, her or their letters, either return a new inventory, in place of the collector's inventory, or any acknowledgement in writing, that he, she or they, have received from the collector the articles contained in the first inventory, or consent to be answerable for the same, in the same manner as if the said inventory had been made out after his, her or their administering upon the estate."

It evidently was with the view to this provision that the court passed this order, which recognized the latter of the two alternatives mentioned in the section and which declared it should be the equivalent of the return of a new inventory in place of the collector's inventory.

The order, nevertheless, directed another inventory to be returned by the executrices, although it appeared at the time there had been delivered to, and receipted for by, the executrices, all the personal property mentioned in the collector's inventory. The order for this further inventory and appraisement was entirely exceptional in its form. The statute, section 2, subchapter 6, declares that "by granting any letters testamentary, or of administration, or of collection, a warrant or warrants shall issue, under the seal of office, authorizing *two* persons of discretion, not related to the deceased, nor interested in the administration, to appraise the goods, chattels and personal estate, known to them, or to be shown by the executor, administrator or collector." And in a subsequent section, it is provided that where another inventory is to be made on account of newly discovered property, or assets not mentioned in the first inventory, *two* appraisers are to be appointed by a justice of the peace or judge of the Orphans' Court. But the order

of the 8th of February named *four* persons as appraisers. Although we do not mean to say the Orphans' Court, in its discretion, had no right to increase the number of appraisers named in the act; it is, nevertheless, clear the new inventory thus ordered was not that required ordinarily in the administration of estates.

The law with respect to the time within which the ordinary inventory is to be returned is thus stated in section 13, of subchapter 6 of Ch. CI of the Act of 1798.

"If an executor or administrator shall not, within three months after the date of his letters, exhibit to the Orphans' Court, an inventory as aforesaid, a summons, returnable within not less than eight, or more than thirty days, may, *ex officio* or on application of a person interested, be issued against such executor or administrator, to show cause wherefore such inventory hath not been exhibited, and if the summons be duly returned "summoned," or upon two citations returned *non est* by the sheriff of the county wherein the party resided at the time of obtaining his letters, or of the county wherein the letters were obtained, in case the party doth not reside in the State, and if he doth not appear at the return of the summons, or appearing shall not show cause satisfactory, the said court may immediately enter on its proceedings and record, that the said letters be revoked, and may proceed to grant other letters, in the same manner as if such executor had not been named in the will, or as if such administrators were not in existence; and the power of such executor or administrator shall thereupon cease, and he shall be bound to deliver up, on demand, to the person obtaining such letters, all the property of the deceased in his hands, or be liable to be sued by such person on his administration bond, or the court may pass an order for the purpose."

If the further inventory was to be governed in all respects by the rules applicable to ordinary inventories, then it should have been returned "within three months after the

date of the letters," and in that case the four executrices must be held to have been in default at the time their application was made to remove Mrs. Glover from the administration, because the letters testamentary were dated the 14th day of January, 1889, and their inventory was not exhibited to the Orphans' Court until the 27th day of April, more than three months after that date.

But we have no idea the proceedings authorized by section 6, subchapter 6, should have been enforced against the four executrices, because the special inventory was not exhibited until thirteen days after the expiration of the three months; since that section should be held in strictness to apply only to default in returning the ordinary inventory.

This is in accordance with the view taken by the Court of Appeals of Mississippi in *Dowdy et al., Executors, vs. Graham, Executor*, 42 Miss., 452; where one of the three executors, who had made return of an inventory of the debts due to the State, asked that his co-executors should be discharged and removed as executors, because, among other misconduct, they had failed to join him in the inventory. The law of that State as to inventories resembled very much the corresponding provisions of our Testamentary Act. But the court held the inventory referred to in the section of the Mississippi Code covering the ground of section 14 of subchapter 6, of our statute, was the ordinary inventory required to be made by the executors after the grant of letters; and that the "refusal" of the two executors to unite in the inventory of debts was not a ground for declaring that "the power and authority of the person so refusing shall thereafter cease."

Strict as is the injunction of section 13, subchapter 6, that the ordinary inventory shall be exhibited within three months after the grant of the letters, the court is nevertheless authorized by section 6 of subchapter 6, to grant further time, upon application. That section provides that—

"When the inventory shall be finished, the appraisers shall certify the same, under their hands and seals, and a certificate of their having taken the oath or affirmation as aforesaid, shall be thereto annexed; and every inventory shall be returned to the proper office within three calendar months from the date of the letters; or within such time from the date of the warrant, in case a second warrant shall have issued, as the case may require, unless further time on application of the party shall be granted by the court."

We can see no reason why further time should not equally be granted to an executor within which to return a special inventory like that required by the order of the 8th of February. Indeed, the language of this section expressly designates "the date of the warrant, in case a second warrant shall have been issued," as the period from which the further time the court may grant an application, shall be measured.

The construction urged by the petitioners is one of excessive rigor, which would practically work a confiscation of valuable rights, a disregard of the expressed wishes of testators, and an injury to the administration of the estate. The position of an executor is a valuable office, from which he should not be deposed without the opportunity of defense. In this case the commissions of each of the five executrices must amount to at least five thousand dollars; according to the liberal scale of commissions allowed in this jurisdiction. The censure implied in the removal of an executor, which must inevitably be taken as a summary conviction of neglect of duty, constitutes a further important reason why such action should not be taken without a fair chance of explanation. It is inconceivable that the Orphans' Court would have refused the petitioners an extension of time for filing the inventory of the 27th of April, or would have denied to Mrs. Glover further time, after that inventory had been filed, if there had been brought to its knowledge a satisfactory reason why such extension should have been granted.

That so severe a construction of the section under examination might readily thwart the wishes of the testator, is obvious. A testator frequently associates with his children as executor a business friend who has been selected from apprehension of the lack of business qualities in those who he felt bound also to appoint.

If those who may desire to be rid of this coadjutor are bent on doing so, they might return an inventory immediately after their appointment, without communicating with the other executor, who might be absent from the jurisdiction, or ill, and if, at the expiration of two months from that time, they claim his dismissal because of his neglect to join in the inventory, a literal construction of the section would leave to the court no alternative but to pronounce his dismissal from further interference in the estate. He might present himself to the court as soon as the action of his co-executors had come to his knowledge, prepared to show that the whole proceeding was a dishonest trick, planned by the co-executors to procure his dismissal, while he had been unconscious from illness, or that he had been absent from the country upon indispensable business, during the entire two months, but the Orphans' Court would, under this construction, be without authority to examine such charge of fraud and trickery, or to consider that the failure had been caused by the act of God in visiting the party with grievous disease, simply because these excuses were presented sixty-one days after the filing of the inventory by the co-executors. If the court has power to import into section 14, subchapter 6, the general provision that three months' time shall be allowed to executors to exhibit an inventory, it should have the power to introduce the further provision from other parts of the act, authorizing the period of three months to be extended, upon proper cause shown. There can hardly be found any other provision of the act which ever received so harsh a construction.

Is there any such peculiar importance in the requirement

of section 14 of subchapter 6, or connected with the subject of inventories in general, that demands this exceptional severity of construction?

The provision of the act upon the general subject already cited (Section 6, Subch. 6) requires an inventory to be returned within three calendar months by the executors, unless further time is granted by the court. The purpose of requiring an inventory is plain—it is that creditors, and all others interested, may be informed what are the assets of the estate, and may thus be advised of the steps necessary to assert their claims. But the act authorizes the Orphans' Court to dispense altogether with the presentation of an inventory in certain cases; and the case before us is probably one of that character.

The will of Mrs. Patten is not presented by the rather meagre record, but if she bequeathed all her personal property to her five children, as was asserted in the argument, or if they were left residuary legatees, then there was no necessity for the return of an inventory at all. Under section 6, of subchapter 14—

“No executor shall be obliged to exhibit any inventory or account, provided he will give bond, instead of the bond hereinbefore directed, with such security and in such penalty as the court shall approve, to the State of Maryland, to be recorded and sued as before directed, with condition for paying all just debts of and claims against the deceased, and all damages which shall be recovered against him as the executor, and also all legacies bequeathed by the will, provided the said executor be residuary legatee, or provided the residuary legatee of full age should notify his or her consent to the court; and in case such bond be given by an executor, he shall be answerable for all debts, claims and damages recovered against him as executor.”

And, again, by section 7 of that subchapter

“No administrator, entitled to the whole residue after payment of debts of, and claims against, the intestate, shall

be obliged to return an inventory or account, provided he will give bond, with such security, and in such penalty as the court shall approve," etc.

As an estate, in the cases so described, might well be settled up without returning an inventory, it would seem unreasonable that the filing of such a return, *punctatim*, by a day certain, could be considered as so thoroughly of the very essence of the administration, that its omission would justify the harsh proceeding demanded by the motion. Especially was there no reason for this harshness in the case before us, because Mrs. Glover, in connection with the other executors, had already receipted to the collector for all the personal estate mentioned in the collector's inventory, and her receipt had been filed in the Orphans' Court, acknowledging the delivery to all the executrices of all that property. The purpose of the statute, as to notice to persons interested, had already been gratified, and there is no pretence that any person whatsoever had received any damage from the delay of Mrs. Glover to file her additional inventory within the sixty days.

It is true the Orphans' Court is forbidden under any pretext of incidental power or constructive authority to exercise any jurisdiction not expressly conferred by law. But this principle is not to be so applied as to forbid that court in the exercise of that jurisdiction from adopting a method of procedure that may not be specified in the grant of power. Thus, by section 1 of subchapter 14, it is declared that "if any person entitled to administration, shall deliver or transmit to the Orphans' Court a declaration admitting that he is willing to decline the trust, the court shall proceed as if such person were not entitled." Although the section does not expressly say the court may appoint a successor to an administrator who resigns his trust, its authority to do so cannot be doubted.

In *Comstock vs. Crawford*, 4 Wall., 404, it was held that the power to accept the resignation of an administrator and

make a second appointment (in the absence of any statute authorizing such resignation) were necessary incidents of the power to grant letters of administration in the first instance. So the jurisdiction to depose a defaulting executor from all further authority in the administration, for neglecting to make a return within two months after his co-executors have exhibited an inventory, carries with it, as part of the power, the authority to withhold such action, when the court, upon a full explanation of the facts, shall see that the default was not culpable or from willful neglect of duty. In such a case, the court, in sympathy with the more lenient provisions of the act, may grant an extension of time for making the return; and this although the excuse may not have been presented until more than two months after the filing of the inventory by the other executors.

We have seen that by section 13, subchapter 6, the court may, upon application of a person interested, issue a summons against an executor who has not returned the usual inventory within three months, requiring him within not more than thirty days to show why the inventory has not been exhibited; and after summons and failure to show cause satisfactory for his neglect, the court may "revoke" his letters. The action demanded under the present motion is equally fatal to the rights of the executor; while it may leave her answerable under her bond to a greater extent than if her power had been absolutely revoked under section 13. The law on the subject of revocation of letters is discussed in 1 Woernor's Law of Administrations, chapter 29. In section 269, the author cites cases to show that the discretion of judges of probate to remove administrators, is to be exercised in furtherance of the paramount end and aim of the law. "Such is the law in every State of the Union, although couched in different phraseology, as well as at this day, in England." "And there shall never be a revocation without due notice to the party, informing him

of the matters alleged against him, and enabling him to defend."

In section 271, it is stated that "before a creditor can have an administrator removed, he must allege and show that he has been injured by the maladministration complained of, and the court has no authority to remove one upon the complaint of his co-executor who is not injured." The author refers in this section to a great number of cases sustaining this general doctrine.

In *Levering vs. Levering*, 64 Maryland, 399, which construed the provisions of the Testamentary Act of 1798, Ch. 101 (the statute before us), respecting the removal of the executors, the court expressed itself thus: "It has been held in some of the States that the power of removal is inherent in the courts of probate, and must necessarily exist in order to prevent a failure of justice. In Maryland, however, an administrator or executor can only be removed for legal and specific causes and after citation and an opportunity to be heard in opposition to the motion. The Orphans' Court has no constructive powers. It has few of the attributes appertaining to courts of general jurisdiction. Its jurisdiction is limited and created by statute, and its exercise of power can receive no support from presumptions. We must, therefore, look to the sources of its power, which are to be found in numerous legislative enactments, designating its duties, and conferring the jurisdiction to the proper performance of its functions." "Justice requires that an executor or administrator should always be permitted to urge in his defense any matters of exculpation which may exist."

If this were not the law on this subject, it would be an anomaly in our whole system of jurisprudence. In England it was a cardinal doctrine that forfeitures were not to be favored, and it was not until the reign of Henry VIII, that an act aimed against the priests and churches declared for the first time that there might be a forfeiture for treason

without office found. The conviction, and still less the mere charge of serious crime, involved at common law no forfeiture of itself—the forfeiture only began from an adjudication to that effect.

The laws and constitutions of most of the States, at this day, disqualify a party engaging in a duel from ever thereafter holding an office of profit or trust. But no such disqualification can take place until there has been a conviction for a breach of the statute. Under the ancient law which confiscated as a deodand the weapon or instrument that caused a violent death, there could be no forfeiture without office found.

Indeed there is nothing more firmly imbedded in our jurisprudence, constitution and laws, than the principle that a man is not to be condemned without a hearing, nor to be deprived of his property or rights without having been first afforded an opportunity of defending himself in the courts. This principle would be wholly set at naught in this case if we were to hold that Mrs. Glover has forfeited her right and office as executrix, because she has not filed an additional inventory within sixty days after her sisters had seen fit to exhibit one to the court, and that because she had shown cause for her *delinquency* within that period, she cannot now be heard to justify her omission.

Believing she has a right to be heard *now* in exculpation, we proceed to examine whether in her defense she “assigns to the court some reasonable excuse which it shall deem satisfactory.”

Our attention is first called to the answer of Mrs. Patten to a petition filed by her sisters on the 10th of May, 1889, in which they pray the court to pass upon their several claims against their mother's estate described in the petition, and authorize their payment. On the same day an order was passed requiring Mrs. Glover to show cause why the relief prayed should not be granted. The petition avers the filing of “an inventory of the personal estate of the de-

ceased" &c., by the petitioners on the 27th of April, but that the said Augusta Patten Glover, although requested so to do by the petitioners, did not unite in returning said inventory at the time it was so returned as aforesaid, nor has she as yet so united, nor has she returned any other or different inventory in the premises. That their mother at her death, was indebted to the four petitioners in the sum of \$45,000, by reason of her administration of their father's estate, and "that, as the petitioners are advised, they may not retain for their said claims against the said Anastasia Patten, deceased, hereinbefore set forth, unless the same be passed by this court; to which end they accordingly pray the court to pass upon their said several claims and authorize the payment of the same, and to that end all necessary orders may be made, directions given, and proceedings had."

Mrs. Glover, in her answer, proceeding to show cause, took up seriatim the allegations of the petition. She admitted she was requested by the attorney of the petitioners to unite in the return of the inventory, and that she did not so unite, nor has she since united or filed any other inventory. "This respondent says that when so requested she was confined by sickness to her bed, as was fully explained to the said attorney; that the said inventory was sent to her chamber, and that upon the best examination she could give the said inventory she found that the same, so far as it went, was correct, but that it was not a full, true and perfect inventory, as required by law, valuable articles belonging to the deceased being omitted, and especially there was, as she was informed and believed, an omission to return assets of the estate to the value of \$45,000, consisting of evidences of debt, which were, with the other securities of the deceased in her possession and belonging to her at the time of her death, which evidences of debt thus omitted from the inventory were, as this respondent charges upon information and belief, never given to the

petitioners, or any of them, and that these evidences of debt are what, on the unfounded assumption that they were so given, is set up in the said petition as a payment to each of the petitioners on account of eleven thousand two hundred and fifty dollars (\$11,250); in all, forty-five thousand dollars (\$45,000), in support of the pretended theory of indebtedness set up in the petition. The respondent says that although she is an executrix under the will of the said Anastasia Pat-ten, and although the said assets were as aforesaid in the possession of the decedent at her death and a part of her estate, the complainants and their agent, though often requested, had, at the time of the said inventory, refused to give this respondent any information as to the nature of the claim or title they alleged to said property, or when or where the transfer to them, if any, was made, or the particulars thereof, so as to enable this respondent to prepare the said inventory or to allow the said respondent to inspect the papers said to be connected therewith, but concealed the same, and the said assets from the said respondent, whereby she was unable to sign the said inventory in the absence of such information; and respondent further says that she advised the said complainants that it would be necessary for her to know, in order to make the said inventory from them, whether they claimed the said assets by virtue of a gift, or payment or otherwise, and the particulars thereof, and that the said respondents, being so advised, refused to make any disclosure touching the same. The respondent is still confined to her chamber, but so soon as sufficiently recovered it is her intention to take such action in respect to the said inventory as in equity and conscience may be proper, and her duty as executrix may require."

She then sets forth at great length, the origin of the supposed claim of the petitioners, denies its validity, and assigns reasons why the notes for \$45,000 should be included in the inventory for the estate. After the filing of this answer no further movement was made by the petitioners

until the 13th of June, when the following order was passed by the court on their motion:

"The petition of Mary E. Patten, Josephine A. Patten, Edith Patten and Helen Patten, with the answer thereto of Augusta P. Glover, in pursuance of the rule to show cause, now came on to be heard and was argued by counsel and considered by the court, and it appearing to the court that the said petition presents a subject-matter within the jurisdiction of the court, but that the claims of the petitioners cannot be determined by this court without the determination of matters whereof this court has not jurisdiction, such as the effect upon the said claims of the will of the testatrix, the payment to respondent on account, as alleged and denied, and other matters it may be; it is therefore ordered, adjudged and decreed this 13th day of June, 1889, that further action upon the said petition be, and the same is hereby, suspended until said other matters, whereof this court has not jurisdiction, shall be first tried and determined in the appropriate tribunal in such manner as counsel may advise."

On the 28th day of June, fifteen days afterwards, and sixty-two days from the 27th day of April, when the inventory was filed, the present motion was made to exclude Mrs. Glover from further interference in the administration of the estate. As we have seen, the justice below, on the 28th of June, allowed her leave to show cause against the application, and she accordingly filed another answer, repeating at length all the matters set forth in her previous response, in excuse of her alleged neglect. Her first answer filed within the two months was before the court when it passed its order on the 13th of June. The last answer filed in accordance with the order of the 28th of June, more than two months after the return of the inventory, sets forth with more particularity the circumstances of her illness; her confinement in childbirth; her inability to leave her house or examine the papers connected with the estate; or to go

over her mother's house and compare the articles there with the inventory; that she had been unable to obtain necessary information with regard to the assets of the estate from her sisters, who have been in sole possession of all the books, papers, evidences of indebtedness, and all the personal property of mother; that being informed that her sisters made claim to certain evidences of debt amounting to \$45,000, said to be secured by a deed of trust, as belonging to them, and not the estate, she asked permission to examine the same, but was refused leave to do so; that being prevented from obtaining the information in this manner, she was compelled to file a bill for discovery against John E. Beall, a real estate agent of Mrs. Patten, for the purpose of learning the particulars of said claim, so that she could make a proper inventory of the estate, as she was informed said Beall was so connected with the transaction that he could explain it; but that Beall, instead of making a full and fair disclosure of the facts within his knowledge, had placed himself in the hands of the counsel of the petitioners, and through him had endeavored to avoid such disclosure upon technical grounds, by demurrer; that she believes the notes for \$45,000 belong to the estate of her mother, and not to her sisters exclusively, and that no inventory of the estate would be complete that would not include them. She further says, "as she has hereinbefore stated, and as she, in substance, stated in the pleading by her filed in answer to the petition of her co-executrices, to have certain claims allowed and to which pleading reference is hereby made, she adopts and approves and makes her own the said inventory, in so far as it states assets belonging to said estate." "That her failure to file any other or additional inventory has been and now is because of her sickness, as hereinbefore set forth, together with the acts of concealment hereinbefore averred, and she avers her readiness and willingness and states it to be her purpose to file a complete inventory of said estate as soon as the facts in relation to the matters in

objection to said inventory filed by her co-executrices referred to can be ascertained by her, and that she intends diligently to seek the information necessary to enable her to file such inventory."

After a careful examination of the entire record we are all of the opinion that Mrs. Glover has disclosed to the court a reasonable excuse for not joining in the inventory of the 27th of April, and it is our unanimous opinion that this court, sitting here, as we do for the time being, as judges of the Orphans' Court, are bound to recognize that excuse as altogether satisfactory.

It was insisted that the excuses presented by the first answer cannot be considered by this court because, although made within the two months, they were made in reply to the application to prove their claim, and therefore should not be considered upon the present inquiry. But all that was said in the first answer as to Mrs. Glover's excuse for not joining in the inventory was in response to the allegations of the petition. If she had not noticed these averments her answer would have been incomplete; as framed it was only responsive to what the petitioners saw fit to aver, and that answer was before this court before the two months had expired.

The Orphan's Court was instituted as a popular court. The judges were not required to be learned in the law, and probably not one of them in the State of Maryland was ever a lawyer. It was intended to be a court where the aid of lawyers was scarcely considered necessary to the conduct of an administration, where no formal pleading was allowed, and to hold that a judge would be justified in shutting his eyes to important facts of a case, plainly developed before him in its progress, because they had been presented in an untechnical manner, and had been written on one piece of paper rather than on another, and to decree as if those facts had never appeared in the case would be at variance alike with the theory and practice of that tribunal.

It would have been the business of the judge to have taken cognizance of such an excuse if it appeared in the proceedings of the court, however presented, and even if the facts had never been written down in legal form, or at all. If Mrs. Glover, within the two months, had orally presented those excuses, the court would have been justified in acting on such an explanation, and in refusing to enforce the rigor of the provision against her. And the defenses presented by the first answer, thus cognizable by the court when the present application was made, were in themselves so reasonable that of themselves they constituted a satisfactory cause for withholding the order asked for on the 28th of June. And as the defenses in the answer to the present application, although not filed until after the expiration of the two months, of themselves also presented a sufficient cause for not granting the order, the two together, of course, constitute a still more satisfactory reply to the application.

Apart from the illness of Mrs. Glover, the refusal of the petitioners to exhibit to her the evidences of their claim to the \$45,000 constituted an ample reason why she should decline to return her final inventory until that information had been furnished. It was contended that she had no right to ask the production of the muniments of title of the petitioners. But this idea is the predicate of the assumption of the very question in controversy, namely; the ownership of the notes. We are told the claim belongs to the petitioners only by themselves; and Mrs. Glover quite as positively denies their exclusive ownership. Of course, if she is correct, her right to inspect her own property is as clear as theirs can be. They are sisters, and equals; and we see no reason why we should receive or reject the assertions of one sister rather than those of another.

But if Mrs. Glover had set up no personal interest whatever in the claim, still it would have been her duty as one of the executors to demand an inspection of the evidences of the claim, before assenting to its being withheld from

the inventory; and all the more because it was presented by her co-executrices. An executor is bound to return under oath all the assets of the decedent's estate "that may come to his sight or knowledge;" and Mrs. Glover had a perfect right and it was her duty, if she deemed it necessary, to examine every article in the house, and every evidence of debt; and no one had the right, upon any pretense, to prevent her from making such an examination. No court can ever decide whether the claim is well founded, unless the papers are produced before it, and without such production and full examination the Orphan's Court has no right to allow it. So obvious and reasonable a claim on her part could never have been resisted, unless one of those inexplainable jealousies had arisen which sometimes occur when one daughter marries and leaves the old home, and those who remain seem to assume that their rights in the house are superior to those of the sister who has established new interests for herself elsewhere.

The order of the 28th of June, 1888, should be annulled and set aside, and the case remanded; and an order will be passed in accordance with the principles of this opinion.

SARAH G. MARSHALL ET AL.

vs.

WOODBURY WHEELER ET AL.

1. Where, by a will, a trust is created and the executor is directed to sell the property for the purpose of carrying out the trust, the power of sale survives him, and the court will appoint a trustee to make the sale and execute the trust. The Maryland Act of 1785 gives to this court ample jurisdiction in such a case.
2. Where, in a proceeding in equity to sell lands, the record shows that the infant defendants were cited and brought into court, *quære* whether it is competent to contradict the record by oral evidence so as to show, as matter of fact, that they were never cited and were never brought into court.
3. Where, however, it appears that the proceeding was for the benefit of the infants and to carry out an express provision of a will, such proceeding will not be invalid because the infants were not cited and brought into court.
4. Misappropriation by the trustee of the proceeds of a sale, made under direction of the court, will not invalidate the sale, unless it was done under a previous plan to defraud, and in which the purchasers participated or of which they had notice prior to the purchase.

In Equity. No. 9988. Decided November 25, 1899.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

HEARD in the General Term in the first instance on a bill filed to cancel and set aside certain conveyances of real estate.

STATEMENT OF THE CASE.

In 1874 Sarah Ann Marshall died, leaving a will containing the following clause: "I give and devise unto my four children, Wilfred John Robert Marshall, Susan Edmonia Marshall, Sarah Gertrude Marshall, and Carrie Maria Marshall, all that tract of land lying in the District of Columbia upon the Central avenue so called, containing about 180 acres, formerly owned by Morduit Young, to them and their heirs, and assigns, in fee simple, and I hereby direct that the said property be sold by my executor with the consent of John P. Waring to the deed of sale, by his signa-

ture, for which he in consideration thereof shall receive out of the proceeds of sale of said land one-third, and the residue to be invested by my executor for the benefit of my four children, share and share alike, and my executor is hereby granted full power to convey said land in fee simple for the purposes herein set forth."

The will named George Robert Wilfred Marshall, the husband of the testatrix, as executor. John P. Waring and one of the children died in the life-time of the testatrix. On the 21st day of June, 1876, suit was instituted in the Supreme Court of the District, No. 5029, equity, for the sale of the land. In this suit George R. W. Marshall, next friend to Wilfred J. R. Marshall, Susan E. Marshall and Sarah G. Marshall, the children of the testatrix, were the plaintiffs, and the said children, infants, were respondents. The bill in that suit (No. 5029) sets out the will, and more particularly the power and declination of the executor, and requests that a trustee may be appointed to carry into effect the provisions of the will by a sale of the property, so that the taxes charged to be in arrear might be paid, and after the payment of the costs and expenses that the residue of the purchase money be invested according to the provisions of the will. On the 6th day of July, 1876, Francis Miller was by an order appointed guardian *ad litem* for the defendants, and the order recites their appearance in open court. On the 22d day of September, 1876, a decree was made directing a sale of the land for the purpose of partition between the parties and appointing John Peter trustee, who died in 1879 without having made a sale, and George R. W. Marshall died May 15, 1880. On June 14, 1880, Woodbury Wheeler was appointed guardian of the surviving children, the complainants in the present case, and on the 18th day of the same month was appointed trustee in place of John Peter, deceased. On October 29, 1880, and November 22, 1884, Wheeler reported sales of the property, which were approved by this court. The bill in this case (Eq. 9988),

by clauses fifteen and sixteen, sets forth that "on the 29th day of October, 1880, the said Wheeler filed in said proceedings the report of a pretended sale of a part of the lands described in section A of the bill of complaint, in which he stated that the same were worth no more than twenty dollars per acre; that the same were wholly unproductive, and that there were due upon the same taxes to the amount of sixteen hundred dollars. Said report proposed to sell said lands to the defendant, William H. H. Griffith, at the rate of twenty dollars per acre, to be paid by a note of said Griffith at five years, no cash being paid for the same. Said report further proposed to dispose of said note by discounting the same and giving a deed of trust upon other of said land as additional collateral security."

"On the said 29th day of October, 1880, and without any notice to complainants or said guardian *ad litem*, an order was passed ratifying said sale to the defendant, Griffith, and authorizing the negotiation of the note of the said Griffith at a discount of 2 per centum, and also authorizing the creation of a lien by deed of trust upon other lands of complainants not sold, for the sum of \$1,600, for the purpose of paying said alleged taxes. Complainants are advised and charge that said court was wholly without jurisdiction to pass said orders, and that the same are null and void. But complainants allege that there were no such taxes due upon said lands, as stated in such petition, and that said allegation was false and fraudulent, and made for the purpose of cheating and defrauding complainants and misleading the court. Complainants are informed and believe that no value was paid by any person upon the faith of said orders, and that the same were procured by the misrepresentations of said Wheeler, made for the purpose of cheating and defrauding complainants. Complainants further aver that the price of said alleged sale was so grossly inadequate as to be of itself evidence of fraud."

In paragraph 18 they say: "Complainants further show

that subsequently, to wit, on or about the 7th day of November, 1884, the said William H. H. Griffith sold to the District of Columbia a strip of said land (previously conveyed to him) for the alleged consideration of \$20 per acre, and paid for in a note at five years, without other security, one hundred and seventeen hundredths feet by thirty feet for the sum of \$400, and that said Wheeler authorized the release of said strip of land from the lien of the said Griffith's note for \$2,188, though the said note had not been paid.

"19. That on the 22d day of November, 1884, the said Wheeler filed a petition in said proceedings, in which he alleges that he is in arrears for interest upon his note for \$1,812. Said petition also alleges that he had made frequent efforts to sell said lands, and was unable to get more than \$20 per acre therefor. It also alleges that in the original proceeding a tract of about seventy-five acres, more or less, had been omitted, being the land described in section B of this bill. Said petition contains a proposition to sell the said encumbered lands and the additional seventy-five acres, making one hundred and fifty-five acres in all, to the defendant, Charles A. McEuen, at the price of \$20 per acre. The said petition does not show in what way the said eighty acres of encumbered lands should be paid for, but states that said McEuen would give his promissory note at five years for the said seventy-five acres.

"20. That on said 22d day of November, 1884, without any notice to complainants, or to said guardian *ad litem*, the said Wheeler procured an order to be passed by this court in said proceedings, whereby he was authorized to convey said lands to said McEuen by separate deeds, said McEuen to assume the encumbrance then upon said eighty acres, and to give his promissory note at five years for the seventy-five acres, and the said trustee was further authorized to sell the said note at a discount of not more than two per cent."

By this bill, Woodbury Wheeler is made a party, also his grantees, Griffith, to whom he sold the first tract; McEuen, to whom he sold the second and third tracts, and George, a grantee of McEuen's of the second and third tracts, are parties.

Messrs. WM. G. JOHNSON and CALDERON CARLISLE for complainants.

Messrs. R. M. VENABLE and LINDEN KENT for defendants.

After making the foregoing statement, Mr. Chief Justice BINGHAM delivered the opinion of the Court:

The questions for decision in this case are, first, the claims of complainants that the court had no jurisdiction to make the decree of September 20, 1876, directing the sale, and that consequently all of the subsequent orders of the court, together with all the transactions of Wheeler, trustee, were null and void and not binding upon the complainants, and that this is true, whether the purchasers had notice or not; second, that if the court had jurisdiction, the acts of Woodbury Wheeler in and about this sale were fraudulent, and his appointment as trustee was procured by misrepresentation of the facts, and for the purpose of cheating the complainants for his own advantage and benefit.

In order to determine the first question, it will be necessary to examine the will. By reference to it, we find there is an absolute devise of one hundred and ninety odd acres of the property claimed by the complainants by the testatrix to her four children, and then follows this language: "I hereby direct that the said property be sold by my executor, with the consent of John P. Waring to the deed of sale, by his signature, for which he, in consideration thereof, shall receive out of the proceeds of sale of said land one-third, and the residue to be invested by my executor for the benefit of my four children, share and share alike."

It is claimed by the complainants that this is simply a naked power to sell with the consent of Waring; that the

executor, who was to make the sale had no interest, and that the power to sell ceased with the death of Waring, who was to authorize the sale; hence no power to sell survived the death of Marshall, the executor, and Waring. If this be true, then the court would not have had jurisdiction to order the sale of the property. There being no trust, there would be no reason for the appointment of a trustee, and nothing could be done except by the parties named as devisees in the will. But is it true? We think that the language, "and I hereby direct that the said property be sold by my executor," is in the nature of a positive provision for the absolute sale of the property, and that the provision that the residue of the proceeds, after compensating Waring for his signature, shall be invested in real estate for the benefit of his four children, creates a trust, and consequently the assumption of the complainants is unwarranted. This will has an absolute direction to sell the property under any and all circumstances, and a trust is created with reference to the proceeds. In each case the power survives the death of the executor. An absolute direction to sell without any qualification by itself, under ordinary circumstances, creates a trust, if it be not contingent or optional, depending upon the judgment or consent of some third person. Under any circumstances, when a trust is created and a person named to execute it, upon the death of the trustee without executing the trust, the trust survives and a trustee will be appointed by a court of equity to execute it.

It is said that John P. Waring was to consent to the sale, and that the right to sell was contingent upon his executing such consent, and hence his death revoked the power given by the will to sell.

We think it was the intent and purpose on the part of the executrix, first, to give this property to her children, and next to provide that this property should be sold by her executor, with the consent of John P. Waring to the

deed of sale, for which he, in consideration thereof, should receive out of the proceeds one-third, and the residue in that event was to be invested by the executor for the benefit of the four children of Sarah Ann Marshall, but that the sale should take place at all events, even if he should not consent. A court of equity would have the power to compel his consent, there being a trust created by the will, and the court would compel the execution of the consent or approval of the party invested with the power of consenting or approving the sale. This position is strengthened by the concluding clause of this section of the will, "and my executor is hereby granted full power to convey said land in fee simple for the purposes herein set forth." He is directed to sell with full power to convey. This may have been a provision by the testatrix for securing to Waring a portion of the proceeds of the sale; it may have been for the purpose simply of divesting the property of any claim of Waring, who was the father of the testatrix, who inherited this land from her mother, so that the price might not be diminished by any outstanding encumbrances. We think the court had jurisdiction to entertain a bill to sell the property under the circumstances. In 1876, when the bill in equity suit 5029 was filed, Waring was dead, and Marshall, who was named as executor in the will, refused to act as such, but filed the bill as the next friend of his young children, the children of the testatrix, and sought a sale of the property. In his bill he states that the lands were encumbered with taxes, and that it was essential and necessary for the best interests of the children that the lands, which were unproductive, should be sold and the proceeds, after discharging the liens then existing upon the estate, be re-invested. There was ample authority for this proceeding in the Act of Maryland of 1785, for enlarging the power of the High Court of Chancery. Counsel for the complainants in their brief refer to this act, citing several sections and claim that there is no provision in the act which would authorize the filing of such

a bill as was filed in equity cause 5029. The fourth section of that act, which counsel omit to refer to, we think gives ample power to file such a bill. It is as follows:

"That if any person hath died, or shall die, leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not, by will or other instrument in writing, appoint a person or persons to sell or convey the same property, or if the person or persons appointed for the purpose aforesaid shall neglect or refuse to execute such trust, or if such person or persons, or any of them, shall die before the execution of such trust, so that the sale cannot be made for the purposes intended, in every such case the chancellor shall have full power and authority, upon application or petition from any person or persons interested in the sale of such property, to appoint such trustee or trustees for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended, as the chancellor shall, in his discretion, think proper."

This is broad and comprehensive, and gives full power not only to sell under the provisions of the will, but to sell the property to pay debts, encumbrances and taxes, the sale in fact having been made more for the purpose of paying debts, encumbrances and taxes, than of re-investment. We have then reached the point where the court had jurisdiction to entertain the bill and to enter the decree of September 22, 1876. This being true, we think it follows that the court had power to enter all the subsequent orders, which it did with reference to the land embraced in the will, and unless there was fraud perpetrated in some way, the sales to these various parties would be valid, and the objection to their present titles, because of the fact that the court had not jurisdiction to order the sale, can not obtain.

It should be noticed that it is claimed by complainants that in equity suit 5029, the court did not obtain jurisdiction of the infants, as no citation was issued and served upon

them, and they never appeared in court. The entry in that case shows that they did appear in court and that a guardian was appointed for them while they were in court. This was disputed, and the testimony of these complainants, one of whom was five and a half years' old at the time of that entry and the other seven years, is that they do not recollect that they were brought into court at that time, and are very positive that they were not in the court-house for ten years after that. We think it would be very unsafe to set aside a solemn recital of a court in a record properly made in a case on oral evidence. Waiving the question as to whether it is competent to do that in a matter relating to jurisdiction, we think that the evidence is entirely insufficient to overcome the record, and we think, furthermore, that this suit was instituted for these infants for their benefit, and to carry out an express provision of the will, as we construe it; and, therefore, if there had not been any service, or they had not been personally present in the court at all, the proceeding is, notwithstanding, a valid one. We think as to the 75 acres which was not embraced in the will, which did not descend from these children to their mother, but descended from their father at his death, the court had not jurisdiction. No allusion is made to this land in the original bill, 5029. Indeed, none could be, because the complainant in that proceeding as next friend was then the owner of this tract. In the year 1884 Woodbury Wheeler represented to the court that this latter tract of land belonged to the estate of the husband of testatrix; that the main portion of this particular estate was in Maryland, and that it was omitted when that estate was sold in Maryland; that it could not be sold there, because it was beyond the jurisdiction of Maryland courts, and asked for direction and authority to sell this 75 acres, as he termed it. A sale was authorized by the court and a report made to the court of a sale to McEuen at \$20 per acre.

We think it is unnecessary to examine, as to the correct-

ness of this proceeding, for the reason that it seems clear that there was no authority whatever on the part of the court to order the sale of this seventy-five acre tract, because it was not in the original petition, and the court had acquired no jurisdiction over it, and there was nothing done afterwards which could by implication give jurisdiction. It was probably supposed that because Wheeler had become the guardian of the children that he might proceed to sell under the guardian's act, for the benefit of the children, in compliance with the statute. He could not do that because the steps taken were not in conformity with the guardian's statute. There is no direction on the part of the testatrix to sell, and, therefore, the court did not acquire jurisdiction under section 4 of the Act of Maryland of 1785. As to this 75 acre tract, we find that there was no jurisdiction acquired by the court to make any order or to ratify any sale or give any validity to any sale that Wheeler made, and as to the same all orders, decrees and conveyances set forth in the pleadings in this case will be set aside and held as null and void.

Was there any fraud practiced in the case as presented to us? Upon the charges of fraud, taking into account the answer of the several defendants and the testimony, was there any such fraud perpetrated as would invalidate the sales made by Wheeler? We have thoroughly examined the testimony relating to the charges of fraud, and we do not find that it is established. It is said that there is a disparity between the price paid and the value of the land. The court should be well satisfied that there was a decided difference between the actual value of the property and the price for which it was sold before inferring fraud. There is no testimony upon which we can rely of that character in this case. It is said that McEuen, by his answer, admits that he paid \$25 per acre for the seventy-five acre tract and \$30 per acre for the eighty acre tract, which was embraced in the will, and of which we hold that the court had jurisdiction to order a sale. Admissions as to the seventy-five

acre tract are unimportant, as we are of opinion that the court had no jurisdiction and that sale is invalid. McEuen's admission, however is not in the nature of testimony, except as against himself. The bill does not call for an answer under oath, and it is not under oath, and is not, therefore, testimony as between Wheeler and the complainants, nor could it be considered for the purpose of proving that Wheeler practiced fraud.

Wheeler, in his answer, refers to the record, and states that this land was sold at the price mentioned in the orders and proceedings in court, and by reference to the record we find that the eighty acre tract was sold for a specified sum per acre, and the representation to procure the order to sell was that it was encumbered with a mortgage or a deed of trust which had been executed theretofore by Wheeler for the purpose of securing four thousand dollars, which had been borrowed about the time of the sale to Griffith of the hundred and ten acres, and this deed of trust of the hundred and eighty acres was executed for the purpose of clearing the premises of encumbrances and not for any other purpose. So far as it appears from the examination of the record, that was the express purpose it was sold for, and the court expressly required the purchaser to assume the encumbrance and pay all taxes due. This seems to dispose of every circumstance tending to establish fraudulent conduct on the part of Wheeler. Whether Wheeler has accounted for the proceeds of these sales or not, or whether he has appropriated them to the benefit of the children, how much he has paid out for taxes, and all that, is a matter for examination and accounting with the complainants, to do which Wheeler advises the court he is anxious and ready at any time when directed by the court. The misappropriation of the proceeds of the sales would not be a matter that would invalidate the sales, unless some previous plan to swindle the infants be proved and shown to have been participated in by the purchasers or that they had notice of the

fraud prior to their purchase. As we have seen, the evidence does not make such a case. *Schrivers Lessee vs. Lynne*, 2 How., 59.

The decree will be that as to the one hundred and ninety acre tract mentioned in the will, there was jurisdiction to make the two sales, one to Griffith of one hundred and ten acres, and the other to McEuen of eighty acres; that these were valid sales, and that there is no fraud shown such as would authorize us to invalidate the sales. As to the seventy-five acres, or a hundred and one acres, whichever it may be designated, the court had not jurisdiction, and all the orders and conveyances are invalid and are declared null and void.

THOMAS W. JONES

vs.

THE PENNSYLVANIA RAILROAD COMPANY ET AL.

and

CHARLES T. STEWART vs. SAME.

-
1. A motion under Sec. 804, R. S. D. C., and Rule 54 of this court, to be technically correct, should explicitly ask the justice who tried the cause to entertain a motion *made on his minutes* to set aside the verdict and grant a new trial "*upon exceptions*," &c.
 2. A motion made under Sec. 806, R. S. D. C., "to set aside the verdict and grant a new trial on exceptions," while not technically in proper form is not invalid because of the omission of the words "bills of," if the circumstances surrounding the conduct of the parties in connection with the motion show that the motion contemplated was that provided for by Sec. 806.
 3. It is not requisite in a motion for a new trial under Sec. 806 to enumerate the grounds upon which the motion is founded, the object of the motion being to procure a review of all the rulings already enumerated in the exceptions.
 4. The power to make Rule 62 of this court (which provides for the extension of the term for the purpose of settling bills of exceptions) was given by Sec. 770, R. S. D. C., and that rule is, therefore, valid.
 5. While it would be more proper to specify the time to which the term is extended, by an order of the court, under the provisions of Rule 62, and also to specify the cases which are designed to be entitled to claim the benefit thereof, yet an omission to do so does not invalidate the order.
 6. The adverse party is entitled to no other notice of an order extending the term for the purpose of settling bills of exceptions than that given by its entry on the minutes of the court.
 7. While an appellate court should do nothing to encourage appeals for delay, yet where a suitor has made an honest effort to exercise his legal right of appeal, and has contravened no absolute rule, but has erred only in not complying with some technical form, it is the duty of the court to overlook such defect and entertain the appeal.

At Law. Nos. 26,298 and 26,303. Decided November 25, 1889.
The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

MOTION to dismiss the appeals in these cases and to strike the causes from the calendar.

These cases were actions brought to recover damages for injuries received by plaintiffs in a railroad accident. Ver-

dicts were rendered for \$10,000 and \$15,000, respectively. Motions for a new trial on bills of exceptions were made and overruled by the court below, and appeals being taken the plaintiffs moved in General Term to dismiss the appeals and to strike the causes from the calendar. The motion being as follows:

"And now come the said plaintiffs by their attorneys, and appearing in the General Term specially for the purpose of objecting to the jurisdiction of the said General Term in each of said causes, and for no other purpose whatever, move the court as follows, to wit:

"*First.* To declare that the bills of exceptions filed in the clerk's office in each of said causes on the 15th day of July, 1889, form no part of the record thereof, and to expunge and strike them from the files of the court.

"*Second.* To dismiss the motion for a new trial upon bills of exceptions, filed in each of said causes in the clerk's office on the 15th day of July, 1889, and—

"*Third.* To strike said causes from the calendar of the General Term."

Said motions are based upon the following grounds, amongst others, to wit:

First. Said causes were tried at the January term, 1889, of the Circuit Court, which expired by limitation, and was adjourned without day on the 11th day of May, 1889, and said term was not prolonged by adjournment for the purpose of preparing bills of exceptions in said causes, nor did the counsel for defendants during said term prepare bills of exceptions and submit the same to counsel for plaintiffs, or notify them of any time at which it was proposed that the same should be settled, or that application would be made to the court to settle bills of exceptions at all, or to extend the term for that purpose. But said bills of exceptions were prepared, after the final adjournment of said term, and settled and signed on the 15th day of July, 1889, without the consent of the attorneys for the plaintiffs, and against their objections and protests.

Second. The Chief Justice, who presided at the trial of said causes, had no authority or jurisdiction to settle and sign said bills of exceptions on the 15th day of July, 1889, when the same was done.

Third. At the time said bills of exceptions were settled and signed, no motion for a new trial, or appeal, was pending, and the time had then expired within which the defendants could legally make such motion, or take such appeal.

Fourth. The only motion for a new trial filed in said causes within four days after verdict, was a motion "on exceptions," addressed to the justice who presided at the trial, of which the General Term could obtain jurisdiction only by appeal from the judgment of said justice overruling said motion, and no such judgment was made, and consequently no appeal was or could have been taken.

Fifth. Said motion for a new trial "on exceptions" was defective in failing to state the specific grounds upon which it was based, and no notice was given to the attorneys for the plaintiffs of the filing of said motion, or of the intention of defendants' attorneys to move the court to act thereon, and said justice could not properly, and did not take jurisdiction thereof, or act thereon, and the defendants' attorneys abandoned the same.

Sixth. No appeal has been taken by the defendants from any judgment of the Circuit Court in said causes, or from any judgment or ruling of the justice who presided at the trial.

Seventh. No motion for a new trial upon bills of exceptions was made in either of said causes within four days after verdict, or at the term at which said causes were tried.

Eighth. The motion for a new trial upon bills of exceptions, filed in said causes on the 15th day of July, 1889, was filed more than four days after verdict, and after the term at which said causes were tried, and was not filed in the Circuit Court.

Ninth. Because said bills of exceptions were settled and signed, and said motions for a new trial were made, in violation of the law and the rules of said court in relation thereto, as set forth in sections of the Revised Statutes of the United States relating to the District of Columbia, numbered from 803 to 806, both inclusive, and the general rules of said court, numbered 2, and from 54 to 65, both inclusive, and 89, which are hereby referred to and made a part of this motion.

Messrs. W. A. COOK and COLE & COLE for the motion:

1. The bills of exceptions form no part of the record, because they were not settled and signed during the term, nor was a definite period fixed by an order of the court, entered during the term, within which the same might be done.

In pursuance of power granted by law this court, in General Term, has provided that the terms of the Circuit Court shall commence on the fourth Monday of February, the second Monday of May, and the third Monday of October in each year. R. S. D. C., Sec. 775; Rule 2.

The act of Congress constituting this court provides that bills of exceptions are to be settled in such *manner* as may be provided by rules of the court, and authorizes the court in General Term to adopt rules regulating the practice of the court, and the rule of the court upon that subject provides that "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it." R. S. D. C., Sec. 770, 803; Rule 62, 26.

This rule is in harmony with the rules of decisions of the Supreme Court upon the subject. *Walton vs. United States*, 9 Wheat., 657; *Bradstreet vs. Thomas*, 4 Peters, 102; *Turner vs. Yeates*, 16 How., 29; *Muller vs. Ehlers*, 91 U. S., 249; *Coughlin vs. District of Columbia*, 106 *Id.*, 7; *Hunnicut vs. Peyton*, 102 *Id.*, 354.

2. The order entered purporting to extend the term is void as to these cases.

It fixes no time within which the bills should be tendered.

No case is found where an order has at any time been made by any court except this, allowing time for preparation of bills of exceptions after term, without limiting the time within which it should be done. And this is the universal practice, not only in the United States courts, but in the courts of the several States. *Hake vs. Strubel*, 121 Ill., 321; *People vs. Blades*, 10 *Id.*, 17; *Dickey vs. Bruce*, 20 *Id.*, 445; *Littleton vs. Leach*, 71 Iowa, 52; *Wicks vs. RR. Co.*, 14 W. Va., and the cases there cited; 14 Blatch., 334; 24 Fed. Rep., 777.

The only way to prolong a term by adjournment is to "adjourn" to a specified day. The word "adjournment" *as applied to courts and other deliberative bodies has two well defined meanings*, to wit, an adjournment *to a day certain*, and an adjournment *without day*; the *former* is adopted when it is desired to *preserve* or "prolong" the session or term, and the latter when it is intended or desired to close it. It necessarily follows that the only way to "prolong" the term is to adjourn to a *specified day*, and that an adjournment *without specifying a day* when the term or session shall again meet for the purpose of continuing or finishing the business before it is a *closing of the term*. 1 Bouvier Law Dictionary, title Adjournment; Anderson's Law Dictionary, title Adjournment; Century Dictionary, title Adjournment; Cushing's Law and Practice of Legislative Assemblies; *Bank vs. Withers*, 6 Wheat., 109; *Van Dyke vs. The State*, 22 Ala., 60; *Brayman vs. Whitcomb*, 134 Mass., 526.

The order purporting to prolong the term is void because made without notice to, or the knowledge or consent of, the plaintiff's attorneys.

By rule of the court the term at which the cases were tried expired on the 11th day of May, 1889, and the bills of exceptions were to be signed within that time, unless the time was prolonged by the order of the court. If such order

was to be applied for, plaintiffs were entitled to notice of the application. Mackey's Practice, 234; Wade on Notice, Secs. 1184 and 1205; Hally vs. Williams, 8 Sm. & M., 487; Dickey vs. Bruce, 21 Ill. App., 445; Conley vs. Silverthorn, 9 Cal., 67; Calderwood vs. Brooks, 28 *Id.*, 154; Campbell vs. Jones, 41 *Id.*, 575; Oglesby vs. Attrill, 12 Fed. Rep., 227; B. R. & A. W. & M. Co. vs. Boles, 24 Cal., 356.

The order purporting to prolong the term is void and inoperative upon these causes because not made in them.

It is not apparent from the language of the order that the court intended it to apply to these cases. They are in no way referred to by the language, nor does it necessarily include them. It does not say in *all* cases tried at that term. The presumption is that it was not intended to apply to these cases. No application seems to have been made to the court for an extension beyond the term to prepare bills of exceptions in these causes. The language of the order does not purport to extend the term in order "to prepare" the bills of exceptions as the rule provides, but to "settle" them. The language of the order is applicable only to cases where the bills had already been prepared and submitted to the judge for "settlement" in matters in relation to which counsel could not agree, and in which the judge had not had time to "settle" them. In such cases the excepting party having done all he could do, and not being in default, would be entitled to his bills of exceptions, although not signed until after the expiration of the term, where the delay was for the convenience of the judge. Such were the cases of *United States vs. Breitling*, 20 How., 252; *Davis vs. Patrick*, 122 U. S., 138.

3. The General Term has no jurisdiction of the motion for a new trial on "exceptions" filed May 3, 1889, because it was addressed to the Circuit Court, to be heard in the first instance by the justice who presided at the trial, upon his minutes, and he did not take jurisdiction of nor act upon the motion, and the same lapsed with the close of the term.

The act of Congress organizing this court prescribes *two methods* by which a party may secure a review by the General Term of the rulings of the justice presiding at the trial upon questions of law, to which the complaining party has excepted before the jury retires.

First. He may make a motion for a new trial, "*upon the bills of exceptions.*" A motion thus made, though filed in the Circuit Court, is deemed and treated by law and the rules of the court as addressed to the General Term, and it has exclusive jurisdiction thereof, which is exercised in the first instance, and without awaiting any action of the Circuit Court or the justice who presided at the trial, other than signing the bills of exceptions. R. S. D. C., Sec. 806; Rule 54, Subdiv. 1.

Second. He may make a motion for a new trial "upon exceptions." This means the exceptions taken by the party and noted by the justice in his minutes of the trial. Of a motion thus made the General Term can obtain jurisdiction in two ways only, to wit:

First. By appeal from the judgment of the justice who presided at the trial, holding the Circuit Court, overruling the motion. R. S. D. C., Secs. 803, 804 and 805; Rule 54, Subdiv. 2.

Upon such appeal "the bills of exceptions," properly settled and signed, are to be used in General Term in the same way as upon a motion made there for a new trial "upon bills of exceptions."

Second. The General Term could obtain jurisdiction of a motion for a new trial "upon exceptions," by certificate of the justice who presided at the trial, to whom it is addressed, directing it to be heard at a General Term in the first instance. *District of Columbia vs. Rapley*, 6 Mackey, 526.

The statutes and the rules of this court hereinbefore referred to make this distinction between a motion for a new trial "upon exceptions," and one "upon bills of exceptions." The one is addressed to the trial court, and is to be heard

in the first instance by the justice who presided at the trial, upon his minutes, unless in his discretion he shall certify it to the General Term to be heard there in the first instance; the other is addressed to the General Term, and it alone has jurisdiction. And this distinction is made in the following decisions of this court: *Doddridge vs. Gaines*, 1 MacArthur, 335; *Pabst vs. RR. Co.*, 2 *Id.*, 48; *Sinclair vs. RR. Co.*, MacA. & Mack., 17; *McPherson vs. Cox*, *Id.*, 29; *District of Columbia vs. Rapley*, *supra*.

Under these rules and decisions the motion of the 3d of May 1889, for a new trial "on exceptions" must be treated as a motion made upon the minutes of the justice who presided at the trial, and addressed to him. He did not take jurisdiction of it. No order was made overruling or continuing it. It must, therefore, be deemed to have lapsed or to have been abandoned, or to have been overruled by force of the rule—Rule 60.

It is immaterial whether it be consider as abandoned, lapsed, or overruled, for if the latter, there has been no appeal from the judgment overruling it, nor has there been any appeal from any judgment of the Circuit Court in either of these causes. The entry of an appeal is necessary in order to give the General Term jurisdiction. *R. S. D. C.*, Sec. 770; Rule 89; *Knapp vs. Post*, 10 Hun., 35; *Bond vs. The Bank*, 65 Md., 501; *Bank vs. Mackall*, 11 G. & J., 456.

The motion for a new trial on exceptions was too vague and indefinite, and the justice who presided at the trial properly declined to consider it.

The rule of court requires that every motion for a new trial shall state the *specific grounds* upon which it is based, and this is in harmony with the rule of decision of all courts upon the subject. Rule 58.

The term "on exceptions" is not a compliance with this rule. The attention of the court and opposing counsel should be called to the *specific exceptions* upon which the

motion is based. *McLain vs. Dibble*, 13 Bush., 297; *Maux vs. Maux*, 81 Ky., 475; *Railroad Co. vs. McCoy, Id.*, 403.

4. The General Term has no jurisdiction of the motion for a new trial on "bills of exceptions" filed July 15, 1889, because it was not made within four days after verdict. Rule No. 58.

This is a limitation of time within which an existing right must be exercised. The court has no power to disregard it or relax it in a given case. *Coughlin vs. D. C.*, 106 U. S., 7; *Houston vs. Kidwell*, 83 Ky., 301; *Ins. Co. vs. Kiernan, Id.*, 468; *Harvey vs. Fink*, 111 Ind., 249; *Conley vs. Silverthorn*, 9 Cal., 67; *Calderwood vs. Brooks*, 28 *Id.*, 154; *Campbell vs. Jones*, 41 *Id.*, 515; *Wills vs. Rhen Kong*, 70 *Id.*, 548.

Messrs. ENOCH TOTTEN and H. H. WELLS for defendant:

The course of practice pursued in these causes was in compliance with the statutes and the rules and usages of the court.

In *Doddrige vs. Gaines*, 1 MacArthur, at page 339, the court say: "The bill of exceptions need not be signed or sealed by the judge, but is to be *settled* by the judge; that is, in some way certified to the appellate court, that the bill of exceptions truly and correctly presents the questions raised before him on the trial now decided." This also has been done. In *Johnson vs. Douglass*, 2 Mackey, 36, a number of cases are mentioned as showing that where the bill has actually been certified to the General Term the appellate court will presume that what was done by the judge was lawfully done—for instance, in *United States vs. Wilkinson*, 12 How., 246, where the date of the bill of exceptions was April 8, 1848, but the trial did not commence until May 7 and 8, 1849, the court said it was doubtless a clerical error, and as the court had settled the bill of exceptions and certified the same to the court as taken in that cause, it was conclusive. See, also, *Dredge vs. Forsythe*, 2 Black, 568; *United States vs. Breitling*, 20 How., 252; *Walton vs. United*

States, 9 Wheat., 657; Turner vs. Yates, 16 How.; Johnson vs. Douglass, 2 Mackey, 36; Stanton vs. Embrey, 93 U. S., 548; Hunnicutt vs. Peyton, 102 *Id.*, 333; Ex parte Crane, 5 Peters, 199.

The statutory provisions relating to signing bills of exceptions, so far as the questions involved here are concerned, are Sec. 803, R. S. D. C., Secs. 705 and 953 R. S., and the Statute of Westminster, 2 (13 Edw. I, Ch. 31; Alex. Brit. Stat., 126). In cases where it may be desired to go to the Supreme Court of the United States from this court, the bill must be *signed* by the judge, although Sec. 803 R. S. D. C., says, it need be neither signed nor sealed; the common law provisions must also be observed. Riggs vs. Thompson, 5 Wall., 663; Origet vs. U. S., 125 U. S., 240.

Section 803, R. S. D. C., provides that if an exception be taken during the trial, it may be entered on the minutes of the justice and afterwards settled *in such manner as may be provided by the rules of the court*. Neither the rules of court nor the statute limit the time for settling, signing or filing bills of exceptions. That branch of the practice is confided wholly to the discretion of the trial judge, except that the sixty-second rule, in a *directory* way, provides that in cases where the bill is not signed during the term, the term "may be prolonged by adjournment in order to prepare it." But it is left to the discretion of the trial judge to determine *when* the bills shall be presented. When additional time has been granted by the court counsel cannot be held responsible for the form or substance of the order. This branch of the objections to the proceedings is a mere criticism upon the language which this court chose to use in making its rules. In cases where the trial judge extends the time for settling the bill of exceptions, without limiting the period within which the bill shall be presented, *it is an act in the exercise of his discretion which an appellate court cannot review*. The Supreme Court has repeatedly declared that the time within which the bills shall be presented rests in the discretion of the presiding judge, and he, and he alone, is to determine what is a

reasonable time for such presentation. *Hunnicut vs. Peyton*, 102 U. S., 354; *United States vs. Breitling*, 20 How., 252; *Stanton vs. Embrey*, 93 U. S., 548; *Dredge vs. Forsyth*, 2 Black, 564; *Phillips vs. Mayer*, 15 How., 160; *Turner vs. Yates*, 16 *Id.*, 28.

Appellate courts will sustain the rights of parties to a hearing on their exceptions where the exceptions have been reserved during the trial and a fair effort made to comply with the rule, and the courts will disregard their own rules for this purpose in the interests of justice.

The Supreme Court, speaking through Taney, C. J., declared that it, "is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." *United States vs. Breitling*, 20 How., 354; *Hunnicut vs. Peyton*, 102 U. S., 358; *Embrey vs. Stanton*, 93 *Id.*, 548.

This motion of May 3, taken in connection with the undertaking amounts to an appeal, and the approval on the paper signed by defendant's counsel, amounts to notice and consent by the plaintiffs. See *Marye vs. Strouse*, 5 Fed. Rep.; *United States vs. Breitling*, 20 How.; *Muller vs. Ehlers*, 91 U. S., cited above. The steps taken in these cases constitute an appeal." Section 772 enacts that—

"Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the General Term."

The Supreme Court has settled it that when the party intending to appeal, signifies his intention of so doing, that fact is sufficient, however informal the paper may be. *United States vs. Adams*, 6 Wall., 101. In the case cited the paper filed (in the Court of Claims) for the purpose of taking an appeal, contained the title of the cause, was signed by counsel, and merely stated that the United States made "application" to that court "for an appeal of the case * * * to the Supreme Court of the United States." This was held to be sufficient.

Even if the motions for new trials of May 3, should be held to have been addressed to the discretion of the trial justice under section 804, R. S. D. C., and paragraph 2 of rule 54, the practice was unobjectionable and effectually removed the cases of the General Term.

This very question has been passed upon and settled by the Supreme Court in *Moore vs. Met. RR. Co.*, 121 U. S., 558.

In *McPherson vs. Cox, MacA. & Mack.*, 23, the court says:

"We have no writ of error; we have a bill of exceptions. We regard a motion made in this court, based upon a bill of exceptions, as equivalent to a writ of error itself, and therefore we look only at the matter of law it contains."

If the motions of May 3 were erroneous, the motions filed with the bill of exceptions effectually removes the case into the General Term.

Undoubtedly the better practice is to file the motion for a new trial, on a bill of exceptions, at the same time with the bill of exceptions. There is an appearance of absurdity in the very recent practice of filing a motion for a new trial within four days. This practice began with the advent of the new rules which, some argue, require *all* motions for new trials to be filed *within four days*. But this interpretation of the rule is erroneous. The rule is the same, precisely, as it was prior to the adoption of the new rules with the unimportant direction (and it is only directory) that such motions, *i. e.*, motions for new trials on a case or bill of exceptions, shall be filed in the *Circuit Court* instead of in the General Term, as was allowable previously.

It may be well remarked here, that this change in the old rule is merely a change in words; to say that the motion to be filed in the General Term or in the Circuit Court suggests only a distinction without a difference, because in either case, we should be obliged to hand the paper to the same man, who would in either case note or record it in

the same book and file it in precisely the same place. The statute (section 753) says all our terms are one term and all our courts are one court (see *Moore vs. Railroad*, 121 U. S., 513), and this is in fact true.

In *O'Neal vs. District of Columbia, Mac A. & Mack.*, 68, this matter was again considered. A bill of exceptions is then again defined by Mr. Justice Cox, delivering the opinion of the court, and it is further said, "It is only when the findings of fact are to be reviewed in General Term, that a case differs from a bill of exceptions. Then a motion for a new trial presenting simply questions of law should be made in General Term."

At page 71, it is further said: "In this there was no motion [a motion for a new trial for insufficient evidence or excessive damages], and consequently [such motion] is not properly before the court. The question then presented for the court here arises upon the bill of exceptions only."

In *Lewis vs. Shepard*, 1 Mackey, 46, it was contended that the rules of practice of this court do not require any motion for new trials to be made within four days after verdict, except such as are to be heard by the justice who tried the cause, and that they make no requirements as to the time and place of filing a motion or bill of exceptions. No motion was in fact filed in the court below, and the plaintiff objected to the settling of the bill of exceptions. The bill, however, was considered, the case entertained, and the judgment of the court below reversed.

In *United States vs. Angney*, 6 Mackey, 66, which was a motion for a new trial in a criminal case, the district attorney objected to the consideration of the motion because it was indefinite, and he objected to the consideration of affidavits supporting it. After saying that the motion was so indefinite as to make it doubtful whether the sufficiency of the indictment was presented thereby, and that the filing of the affidavits was undoubtedly irregular, the court said:

"Undoubtedly, however, the time within which the mo-

tion may be filed, or the showing in whole or in part be made, might have been extended by the trial court; and undoubtedly that court might, and this court may, entertain and consider the subsequent affidavits."

The only materiality of this case is that it shows that it is entirely within the discretion of this court to extend the time or amend the form in which proceedings may be taken for new trials; that the rules are always subject to be changed or constructed at the discretion of the court.

Mr. Justice HAGNER delivered the opinion of the Court :

Motions to dismiss the appeals are made in these cases. The facts, in brief, are as follows: On the 1st of May, 1889, the jury rendered a large verdict in each case for the plaintiff. On the 3d of May (within the four days limited by the rule) the defendant's counsel made the motion for a new trial which is the subject of the present controversy. On the 8th of the month supersedeas bonds were filed, which were indorsed as satisfactory by the plaintiff's counsel and affirmed by the court. On the 11th the court passed the order extending and prolonging the term for the purpose of settling exceptions in cases tried at the term, where the bills had not been settled. On the 20th of June, the defendant's counsel gave notice to the counsel of the plaintiff that the bills of exceptions would be presented to the presiding justice on the 25th of that month. On that day the plaintiff's counsel appeared and interposed objections in writing, on various grounds, to the settling of the exceptions. After argument these objections were overruled, and the bills were finally settled and signed on the 15th of July.

The reasons assigned, and earnestly pressed in support of the motion to dismiss the appeal, attack the regularity and efficacy of every step we have alluded to from the first notice of the motion for a new trial.

1. This motion of the defendant's counsel, made in open court on the second day after the verdict, is in these words: "Now come the defendants and move the court to set aside the verdict and grant a new trial *on exceptions*."

It is insisted by the plaintiffs that this must have been designed at the time and can only be understood as a motion under section 804 of our Revised Statutes, and hence it cannot now be regarded as such an appeal to the General Term as will authorize us to examine the rulings below, as presented by the bill of exceptions contained in the record.

The provisions of the Revised Statutes District of Columbia upon the subject of motions for new trials, are:

SEC. 803. "If upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the question to be raised, but such case or bill of exceptions need not be sealed or signed.

SEC. 804. "The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages, but such motion shall be heard at the same term at which the trial was had."

SEC. 805. "When such motion is made and heard upon the minutes, an appeal to the General Term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner."

SEC. 806. "A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court shall be heard in the first instance at a General Term."

The defendant's counsel insist their motion was intended to be made under section 806, and not under 804 and 805. They admit the language of the motion is imperfect and incorrect, because of the omission of the words "bill of;" but they insist this was a mere clerical error which should not affect the efficacy of the motion.

The motion cannot be considered as strictly following the method indicated by either of the sections referred to.

If the defendant had intended to present a motion literally complying with the requirements of section 804, and rule 54, applicable thereto, he would have explicitly asked the justice who tried the cause to entertain a motion to be *made on his minutes* to set aside the verdict and grant a new trial "*upon exceptions*," &c. The actual motion seems to differ more in language from that thus indicated than it does from the literal requirements of section 806.

We must look to the surrounding circumstances of the transaction for guidance as to the purpose of the motion.

If the defendant had been proceeding under section 804, and the justice had decided to "entertain the motion," it would have been the duty of counsel on both sides to submit or argue it before the justice; and if it had been overruled the defendant could then appeal *from that decision* to the General Term.

But no such steps were taken here as are required under sections 804 and 805; and the omission to pursue those methods of obtaining the benefits of these sections tend to show that they were not in the contemplation of the defendant.

On the other hand, if the purpose was to proceed under section 806, all was done by the defendants, after the imperfect motion was made in open court, that was required to obtain the benefit of that section.

On the 8th of May supersedeas bonds were filed by the counsel for the defendants, and after being submitted to the counsel for the plaintiffs, who pronounced the sureties satisfactory, they were approved by the justice. Now, if the defendants had been proceeding under section 804 no supersedeas bond would have been presented at that stage, for no such bond is necessary while the trial justice is hearing a motion for a new trial on exceptions noted on his minutes,

since no execution could issue while the motion was pending. But the counsel for the defendants took the trouble, before this supersedeas bond was submitted to the court, to secure from the counsel for the plaintiffs his approval of the sureties. It may be said the plaintiffs' counsel was not obliged to set his opponent right, if he then thought he was doing a futile thing in giving a bond where none was needed. But still his conduct in certifying to the sufficiency of the bond looked as if he was acting at that time in accordance with what the defendants now insist was their object in filing the motion; we do not say it is conclusive of the question, but we think it is persuasive to us of the understanding of those interested in the matter at that time, and especially of the understanding of the justice when he approved the bond.

That the defendants' counsel intended to take efficient steps to procure a review of the rulings of the lower court cannot be doubted; that his motion was carelessly worded is equally clear. But in the light of the surrounding circumstances we entertain no doubt as to the particular form of review he wished to avail himself of. If the motion had been framed in faulty grammar or incorrectly spelled, it would not have been rejected as insufficient so long as it was not insensible; and we cannot consider that the omission of the two words, "bills of," invalidates the motion of the 3d of May.

2. It is next said that the motion is invalid, because it does not comply with rule 58, which requires that all motions for a new trial shall particularly enumerate the grounds upon which the motion was made, in separate paragraphs, &c.

The preceding rule contains a form of the motion there under discussion, which is that to be made to "the justice who tried the cause." Such an enumeration is requisite under section 804; but not under section 806, there the object is to procure a review of all the rulings already enumerated in the exceptions.

3. The next point made is that we cannot entertain this appeal because the bill of exceptions was submitted to and signed by the judge after the expiration of the term; and it is said, first, that there is no authority in the court to extend the term for any such purpose. We have a rule, No. 62, explicitly saying that it can be done, and that rule is one that is certainly within the power of the court to make. Section 770, of the Revised Statutes, provides that "the Supreme Court, in General Term, shall adopt such rules as it may think proper, to regulate the time and manner of making appeals from the Special Term to the General Term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules." This is ample power for making rule 62. The courts would be in a very bad predicament unless there was some such power lodged in them, for it not unfrequently happens—it is almost always the case—that most important causes are tried at the end of the term, the bills of exception in which cannot be settled during the progress of the trial, which for weeks drags itself along until the end of the term. It would often be impossible to settle the bills of exceptions in such a state of case, and if the court was without authority to pass such a rule, parties would be deprived of all means of presenting their cases to the appellate court for review, unless the court should discontinue the trials for a considerable time before the end of the term, which would involve the loss of much valuable time at the close of each term.

4. On the last day of the term the presiding justice passed the order before referred to, which was entered on the minutes by the clerk in these words: "The court orders the term of the court extended and prolonged to settle bills of exceptions and cases."

It is contended by the defendants that this order is not justified by the rule referred to, which is as follows:

Rule 62. The bill of exceptions must be settled before

the close of the term, which may be prolonged by adjournment in order to prepare it.

First. Because the order authorized an indefinite extension of the term, whereas the rule speaks of an *adjournment*, which it is insisted necessarily implies prolongation *to a definite day*. The derivation of the word is appealed to as supporting the contention, and that in parliamentary bodies every adjournment must either be to a *day certain*, or *sine die*, and that an indefinite adjournment, as in this case, necessarily implies a final adjournment.

Although it would evidently be advisable to limit the time within which the bills of exceptions should be presented, we do not consider the omission to do so in this instance as having the effect insisted on. The final closing of the term was a matter wholly within the power of the court at any time, when the justice should be of the opinion that a sufficient indulgence had been extended for the purpose of presenting the bills of exceptions. Such orders have been on other occasions recorded in this form by the clerk.

Second. It is said to be unauthorized, because it does not specify the cases which were designed to be included in the order.

We do not think this objection can be sustained. The order was broad enough to include the present cases, and that others could have been embraced within its general language could not deprive these parties of their rights. We repeat the remark, that it would be decidedly preferable that there should be an enumeration of the cases left open entitled to claim the benefit of the order.

5. Then it is next said the justice had no right to pass the order without notice to the plaintiffs; but they had the notice that was given to the whole world when this entry was made on the minutes of the court, and that was all the notice required.

6. Then, had the justice the right to sign the exceptions

when they were presented to him? No complaint can be made on the ground of lack of notice, as the defendants gave notice, and the plaintiffs were present according to the notice, and contested the right of the court to settle the bill of exceptions. We think the justice had that right, and that the exceptions are properly before us on appeal.

All appellate courts are aware that appeals are increasing in undue proportion to the general increase of legal business. This undue increase is a grievance and a reproach to the judicial system. The facility of presenting appeals encourages their prosecution where delay may be the main purpose, to the serious injury of deserving suitors. The appellate courts should do nothing to encourage this, although they may be powerless to prevent it, and it is their duty to refuse to entertain appeals where they present themselves in contravention to law or explicit rules.

But when we can see that a suitor has made an honest effort to exercise his legal right of appeal, and has contravened no absolute rule, but has erred only in not complying with some technical formality, we think it is our duty to overrule such a defect and entertain the appeal.

The motions are overruled.

LAMON *vs.* McKEE
and
McKEE *vs.* COCHRANE.

1. In considering whether the court has jurisdiction to pass an interlocutory decree that defendant pay a certain fund into court on the ground that complainant has an equitable lien thereon, the allegations of the bill will alone be looked to, the statements of the answer or other portions of the pleadings cannot be regarded; for, unless charged in the bill, such facts are not properly in issue and no such relief can, therefore, be decreed in respect of them.
2. It is not sufficient merely to allege an equitable lien or trust in order to obtain a decree satisfying plaintiff's demand out of a particular fund; but circumstances must be shown from which the court may be able to see that the allegation is justified by the facts set forth.
3. There must be a specific assignment and appropriation by the debtor of the fund or part of it, to the payment of the creditor's claim, before an equitable lien is obtained; the mere allegation that the debtor is alleged to be insolvent and that he has promised to pay the debt out of the fund is not sufficient.
4. It is not proper for a plaintiff to claim in his bill that an instrument is fraudulent and should for that reason be declared void; and then to insist, if it should be held valid, that he is entitled to its benefits; such contradictory claims in the same bill are not to be encouraged; the pleader must claim either under or against the instrument.
5. The Equity Court had no jurisdiction in this case to pass the decree on the 31st of July, 1888, directing McKee to bring into court \$138,500, the bill presenting no case for the equitable interference of the court in this manner.
6. An appeal or writ of error does not lie from an order directing an attachment against a party as for a contempt of court. The party against whom such an order has been made must seek redress in another manner; either by motion in the court ordering the attachment, or he may present his grievance to a superior court, by petition for a *habeas corpus*, or for a *mandamus*.
7. No appeal lies by a person whose application to be admitted as a party to a cause has been refused by the equity justice.
8. A cross-bill, when it seeks relief of an equitable nature, should contain all the necessary allegations which confer upon the party an equitable title to relief; otherwise it will be open to demurrer.
9. Cross-bills are not to be favored.
10. An interlocutory decree dismissing a cross-bill is not appealable. *Ayres vs. Carver*, 17 How., 598.
11. It is a well settled principle of equity that the court will be much stricter in allowing amendments to answers than to bills; it is only upon a very strong case and special circumstances that the former will be allowed.
12. The allowance of such amendment is a matter of discretion with the court below, and is not appealable.

13. A complainant in a bill of interpleader where money is paid into court has no right to be dismissed unless the case is at issue, but when that stage is reached he is entitled to ask for such a decree; the dismissal, however, should be without prejudice to the right of any and of all the defendants to institute any action at law or in equity to recover from the complainant any demands which they or any of them may have for amounts due from him over and above the money paid into court.
14. An appeal does not lie from an interlocutory order appointing an examiner to take testimony as to the disposition of a portion of a fund paid into court.

In Equity. Nos. 11,238 and 11,282. Decided December 2, 1889.
The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeals and cross-appeals from orders passed by the Special Term in equity in two cases.

STATEMENT OF THE CASE.

In the first of these cases, No. 11,238, a bill was filed by Lamon and Black against McKee, the executor of Cochrane, and the executors of the estate of Thomas A. Scott. They sue in their own right, and also as surviving partners of the firm of Black, Lamon & Co. The allegations of fact are very voluminous, but it is necessary they should be stated to some extent for an understanding of the views of the court.

The bill proceeds to set forth the subject-matter of this controversy which grew out of transactions more than half a century old. Before 1830 the Choctaws had a large claim against the United States growing out of the cession by the nation to the United States of extensive tracts of land east of the Mississippi. The adjustment of that claim was delayed, and the Choctaws have been attempting ever since that time to obtain a settlement. In 1855 another treaty was made with a view to the adjustment, but further proceedings before Congress and the Departments became necessary to enable the Choctaws to obtain the money. The bill in the fifth section charges that before the ratification of the treaty, they had last endeavored, without success, to bring about an adjustment of their claim, and had sought the services of John T. Cochrane, who was then residing at

Washington, with a view of securing his efforts in their behalf; that by a resolution of the Choctaw Council, Peter P. Pitchlynn, Israel Folsom, Dickson W. Lewis and Samuel Garland were appointed delegates and fully empowered to represent and defend the rights of the nation, and to enter into all contracts in their judgment necessary to its settlement; and it set forth the legislation of the Choctaw Nation on the subject, with the contract made in March, 1854, by Pitchlynn and the others with Cochrane, employing him as the agent of the nation.

This contract recited that Albert Pike, their first attorney, had been obliged to leave Washington and had relinquished all connection with the case; that for many years past they had been obliged, in consequence of Pike's withdrawal, to rely and depend upon Cochrane, who had rendered all services in the prosecution of this claim that had been performed under Pike's contract; that Cochrane had also for several years past been acting as their agent in the prosecution of other claims against the Government by the Choctaw Nation for arrearage of annuities and school moneys, in connection with which he had rendered services of the most valuable character, and having still to rely upon Cochrane for the proper management of all their said claims and demands, they therefore declared the contract with Pike at an end, and clothed Cochrane with full power to conduct and prosecute the claims, conferring upon him all powers and authority as their agent. The obligations assumed by Cochrane are thus set forth in the contract:

"The party of the second part hereby agrees, obligates and binds himself to continue, as heretofore, with zeal, energy and faithfulness, to urge and prosecute all the unsettled claims and demands of the Choctaw Nation, upon the United States, before any of the Departments or officers thereof, and, if necessary, before Congress, and especially the claim of said nation arising under the treaty of Dancing Rabbit Creek, of September 27, 1830, to the net proceeds of the lands ceded

to the United States by that treaty, and the said party of the second part further obligates and binds himself to do his best and utmost to obtain payment of said claims and demands, and in all things appertaining thereunto to faithfully represent the said Nation and guard its interests and strive to enforce its rights, at his own cost and expense."

The obligations of the Choctaws to Cochrane were thus set forth :

"And the said parties of the first part, for and in behalf of, and in the name of the Choctaws, do hereby covenant, promise, and agree, to and with the said party of the second part, and thereto solemnly and irrevocably pledge its and their faith and honor, that of, and out of any and all moneys obtained by and paid to said nation, or individuals thereof, for and on account of any or all of said claims, there shall be promptly and faithfully paid to the said party of the second part, the amount of 30 per centum of every and all such sum or sums of money, payable to the said party of the second part, his heirs or assigns, so soon as the same shall be paid over by the United States to the said Choctaw Nation or its legally authorized representatives, without any evasion or delay ;" and it was further provided that any person into whose hands the money shall be paid on account of said claim should be authorized and empowered to pay over to Cochrane, his heirs or assigns, out of any money so received, the said 30 per cent. That very soon after November, 1853, Cochrane commenced rendering valuable and important services for the Indians, and describes their extent and character ; among them the ratification of a new treaty in 1855, which referred to the Senate the adjudication of the claim. A favorable award was made by that body in March, 1859, and the Secretary of the Interior was empowered to ascertain and report the amount of the net proceeds under the award, and that officer certified the amount due as nearly \$3,000,000; and in 1861 a payment of \$250,000 on account was made to the

Choctaws. The Choctaw Nation during the Civil War, having been in armed hostility to the United States, the payment of the residue of the claim was suspended for many years by Congress; that in 1866 Cochrane was stricken with a mortal sickness, and with a view to securing for himself and his family some remuneration for the services he had performed in behalf of the Choctaw Nation, he called upon the plaintiff, Lamson, and proposed to assign to him, or to some person in his behalf, all his interest in the contract; and, thereupon, it was verbally arranged between the said Lamson and Cochrane (the delegates representing the said Indians not only consenting thereto, but earnestly desiring that the arrangements should be made); that Cochrane should assign all his interest in said contract to Jeremiah S. Black, then a partner of the plaintiffs; the said Cochrane receiving as a part payment, in consideration of such assignment, the sum of \$75,000 in cash, and that there should also be paid to Cochrane's executor, if Cochrane should die before the realization of said claim, the further sum of \$75,000 whenever the claim should be finally paid; that before the said arrangement could be carried into effect, Cochrane died, and John D. McPherson was thereupon duly qualified as his executor; that after his death, Lamson, considering that he was under solemn obligation to carry the arrangement into effect, caused a contract to be entered into between McPherson, as executor, and Jeremiah S. Black (subsequently ratified by the Choctaws), which recited most of the foregoing facts, and substituted Black as attorney in place of Cochrane, with a compensation of 30 per cent.; and provided that Black was to pay out of any moneys received by him from the proceeds of said claim, to Cochrane's executor, such sum as should be agreed upon between the parties.

The complainants further aver: "By reason of the said several votes of the Choctaw Council, and by virtue of the contract entered into between the said delegates and the

said John T. Cochrane, and the subsequent assignment thereof to the said Black, all of which was ratified and confirmed by the vote referred to, the right of Cochrane to receive the 30 per cent. of such sum as might be recovered on account of said claim became fully vested in the said Jeremiah S. Black;" that the plaintiff, Lamon, in order to raise the funds necessary to make the payment to Cochrane's executor, applied to Thomas A. Scott, who gave to Cochrane's executor \$25,000 in cash, and two notes for the same amount, and that it was understood between Lamon and Scott that Lamon was to pay one-half of the money so advanced in cash and one of said notes for \$25,000; that it was mutually agreed between Black, Lamon & Co. and Scott, with the full knowledge and approval of the delegates of the Indians, that Lamon was to receive, in consideration of such payment and of his services, the sum of \$250,000, in addition to the sum advanced by him, whenever the claim should be realized. Mr. Black's letter and assignment to that effect is filed, with a memorandum containing his statement of the agreement between the firm, Lamon and McPherson.

Lamon further alleges that it being necessary to pay this money promptly, he paid one of the notes for \$25,000, and when the firm of Black, Lamon & Co. was dissolved, the complainants succeeded to the interest of Black in the remainder of said 30 per cent. and that it was understood between Scott and Lamon that each of them should participate in the said 30 per cent. to the extent of \$237,500. Lamon also claims a further interest as a member of the partnership of Black, Lamon & Co.; and Chauncey F. Black as one of the firm of Black, Lamon & Co., claims an interest in the remaining one-third as copartnership assets. That Lamon and the firm of Black, Lamon & Co. immediately undertook to prosecute the claim with great persistence, and that when Mr. Black, by reason of his failing health, was compelled to abandon the work, the duty

devolved upon Lamon; that neither of them had ever received any compensation for their advances, or for prosecuting the claim for many years. Finally an act of Congress was passed referring the case to the Court of Claims, and which gave an award against the Government, and the case was taken to the Supreme Court of the United States, and that court rendered judgment against the United States for the sum of \$2,981,247.30, with interest, and an act of Congress was passed making an appropriation to pay the money.

The bill states that the executors of Scott not only claim an interest in the 30 per cent. but wrongfully and unjustly claimed that Scott advanced and paid the whole sum of \$75,000; that John D. McPherson, executor of the estate of Cochrane, unjustly and wrongfully claims a greater interest in the said 30 per cent. than the sum of \$75,000, to which he would be entitled as such executor whenever said 30 per cent. should be paid, and seeks to recover out of said 30 per cent. the sum of about \$150,000, instead of the sum of \$75,000. That McKee, who was an agent doing business about Washington, while the complainant was engaged in this case, about the 16th of July, 1870, having ingratiated himself into the confidence of one of the Choctaw delegates, succeeded in procuring the execution of a contract, filed as an exhibit, which recites the proceedings of the Choctaw Nation appointing the delegates and then proceeds:

“Whereas on behalf of the Choctaw people we have employed James G. Blunt, of the city and county of Leavenworth, State of Kansas, and Henry E. McKee, of Fort Smith, Arkansas, as counsel to prosecute said claim and recover the same to the Choctaw Nation or people: “It is therefore stipulated and agreed that for services rendered and money expended and to be expended by them in the prosecution of said claims, the said James G. Blunt and Henry E. McKee shall receive 30 per centum of the \$1,834,084 awarded

and due to the Choctaw people by the United States, or of any sum that may be paid by the United States on account of said claim, which 30 per centum of said claim shall be paid to said Blunt and McKee, or their legal representatives, whenever the money or bonds arising from said claim shall come into the possession of the party or parties authorized by the Choctaw people to receive the same." Then follows this clause, upon which much stress is laid by complainants: "The said Blunt and McKee to pay to Mrs. John T. Cochrane, of Washington City, D. C., 5 per centum from the 30 per centum before referred to whenever they shall receive the same; and the said Blunt and McKee further agree to adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim upon the principle of equity and justice, according to the value of the services so rendered."

The plaintiffs attack the validity of the contract, upon the ground that the delegates were not authorized to make it, because they had exhausted their power, and had no right to enter into a new contract to bind the Choctaw Nation; that even if they had a right to enter into such a contract, it became void and inoperative soon after its execution by reason of the withdrawal of Blunt, one of the contracting parties mentioned therein; that even if Blunt and McKee had any authority to prosecute the claim, and if it should be determined by the court that the contract had any legality whatever, yet its proper meaning and construction is that Blunt and McKee should not have any interest in the said 30 per cent. until they had first adjusted the claims of the plaintiff; that if the court should hold that the contract with Blunt and McKee is a valid one, and that the settlement and adjustment of the claims of plaintiffs and others was not a condition precedent to their acquiring the right to prosecute the claim and receive remuneration therefor, yet even in that case, by the terms of the contract itself, out of any moneys that should come into the

hands of McKee by reason of his contract, or any subsequent arrangement founded thereon, he was bound in equity and justice to satisfy the claim of plaintiff for money advanced and just compensation for services which the said Lamont had heretofore rendered in that behalf, as well as to recompense the said plaintiffs for the services rendered by them and the said Jeremiah S. Black during the existence of the co-partnership heretofore existing between those parties.

That McKee had induced the Choctaw Nation, at its last general council, to pass certain acts appointing him the agent of the nation, to receive from the United States any money which might be appropriated to pay the judgment of the Court of Claims; had provided himself with apparent authority from the nation empowering him, in their name and behalf, to receive said moneys from the United States, and threatens to draw the money upon such warrants as may be issued.

The other persons than those above mentioned, claim to have rendered services in the prosecution of said claim under circumstances to give them a legal and equitable right to a portion of said funds; the nature of said claims, or the names of the persons they cannot state, and neither affirm or deny whether said claims constitute legal and equitable charges upon said fund; and the plaintiffs pray leave when they shall have discovered the said persons, to be allowed to make them parties, that all such claims may be determined and settled in this cause.

Then there follows an allegation that McKee is insolvent; and they set forth various defenses which they understand are made by McKee; he at times contending that the contract is valid, whereas the complainants charge the contrary to be true, since it is not a valid subsisting contract, because not executed by the proper parties, and for various other reasons. They pray that the parties shall appear and answer; that the writ of injunction shall issue directed to the defendants, commanding and restraining them, their

agents, servants and attorneys from further prosecuting the collection of the said 30 per centum of said judgment set apart for the payment of the expenses of the said claim, or any portion thereof, and particularly enjoining and restraining McKee, his confederates, agents and attorneys, pending this cause from receiving or intermeddling with any warrant, draft or other requisition upon the Treasury of the United States, which he may receive under the authority of the Choctaw Nation of Indians until the further order of the court, and that an accounting may be had with reference to the amount justly due the plaintiffs, by reason of moneys advanced and services rendered in the prosecution of said claim, and that a receiver may be appointed according to the usages and practices of the court to collect from the Treasury this 30 per cent., whenever the same shall become due and payable to McKee, or any other person authorized to receive the same, and to pay the same over to the plaintiffs and such persons as have a just and equitable claim thereto, as the court may direct.

A restraining order was issued the day this bill was filed, which was served on McKee, but no bond was given as required by the rule of the court; and on the succeeding day, McKee went to the Treasury and drew \$787,000 which was 25 per cent. of the whole judgment, 5 per cent. of the 30 per cent. having been paid to one Luce, who had taken Blunt's place in the contract. A motion was made in court for an attachment against McKee for disobeying the injunction, but it appearing that no bond had been filed, the motion for an attachment was overruled, and McKee was discharged.

The next movement in the case was an application by Lamon for a receiver, in these words: "And now, the said complainants come into court here and pray for the appointment of a receiver in said cause, according to the usages, practice and rules of said court as prayed for in said bill of complaint."

"And these complainants thereupon show that they

reasonably fear that the funds and moneys admitted to be in the hands of the defendant McKee, by his answer to the order to show cause, this day by him filed, will not be forthcoming to satisfy the final decree which may be entered in said cause, unless the said fund is taken into the possession of some indifferent person to hold during the progress of the litigation."

After argument a decision was rendered, and a decree passed by the justice in these words, on the 31st day of July, 1888: "That the defendant, Henry E. McKee, do forthwith pay into the court, to the clerk thereof, out of the moneys received by him from the Treasury of the United States on the 9th day of July, inst., the sum of one hundred and thirty-six thousand five hundred dollars (\$136,500) without prejudice to any right or claim which the said complainants may have to the sum of \$161,197.06 heretofore paid into court by the defendant, McKee, in equity cause No. 11,262; and said sum first mentioned shall be held as and for security for such persons as shall establish a claim thereto under the contract of John T. Cochrane with the Choctaw Nation of Indians or his assignee, or their contract with Jeremiah S. Black, and any amount as to which no valid claim shall be established by final decree to be returned to the defendant, McKee.

"And it is further ordered that the said sum shall be, by the said clerk, forthwith invested in registered bonds of the United States or in the 3-60-5 bonds of the District of Columbia so called.

"And it is further ordered that upon a compliance by the said defendant with this order the application of the complainants for an injunction and receiver be dismissed without prejudice."

From that decree an appeal was entered by McKee. McKee did not comply with the order, and proceedings for contempt were instituted against him, and the justice below ordered an attachment to issue requiring him to show cause

why he should not be committed for contempt in not having obeyed the order. McKee's appeal from the decree of the 31st of July was dismissed by the General Term, upon the ground that it was a decree interlocutory in its nature, from which an appeal would not lie. Then various attempts were made in behalf of McKee, in the Equity Court to procure a rescission of the order, and finally an application to the justice below to hear the question re-argued was certified to the General Term, to be heard in the first instance.

Messrs. J. J. WEED and B. F. RICE for McKee.

Messrs. G. F. APPLEBY, C. CARLISLE for the executor of Cochrane.

Messrs. WM. H. PHILLIPS, J. R. McCAMMON and JOHN S. BLAIR for Scott's executors.

Messrs. JAMES COLEMAN and NATHANIEL WILSON for Lamon and Black.

After making the foregoing statement of facts, Mr. Justice HAGNER delivered the opinion of the Court, as follows:

The first question presented in these cases is whether the order of 31st of July, 1888, was one that the Equity Court had authority to pass. It is insisted by those who maintain its legality that the justice was fully authorized to make such an order, upon consideration of the entire proceedings up to that time, comprehending not only the allegations of the bill, but the admissions of the answers and whatever else, by way of affidavit, or otherwise, then appeared in the cause.

It will be observed that the petition did not ask for such an order, but only prayed for a receiver, "according to the usages, practices, and rules of this court, as prayed for in the said bill of complaint." The prayer of the bill for an injunction had already been passed upon; and this was only a repetition of the other prayer, hitherto not acted upon, asking for a receiver, who should be authorized to collect from the Treasury of the United States said 30 per

cent., whenever the same should become payable, either to McKee or any other person, and pay over the same to the plaintiff and to others entitled thereto.

We are of opinion that in considering the validity of the order, we are confined to the examination of the bill alone; and that the answer, and everything that had occurred subsequent to the bill must be excluded from our consideration. I will refer to a few of the numerous authorities on this point. In Story's Equity Pleading, section 257, it is said :

"And this leads us to remark, in the next place, that every fact essential to the plaintiff's title to maintain the bill and obtain relief must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill; and, of course, no proof can be generally offered of facts not in the bill; nor can relief be granted of matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court announces its decree *secundum allegata et probata*."

And in section 264, "The rule even proceeds further, for if an admission is made in the answer it will be of no use to the plaintiff, unless it is put in issue by some charge in the bill; and the consequence is that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings. This would occur, for example, when a bill is brought against an executor for an account, and it prays an account of the personal estate of the testator, but it does not charge any act of mismanagement or misconduct in the executor, but simply charges that he has received assets. In such a case, although the answer should disclose gross acts of mismanagement and willful neglect or default, whereby assets had not been received, yet no decree for an account upon such matters could be obtained upon a bill so framed, for it would not be a matter in issue." The author cites Gresley's Equity Evidence, page 23. In

Jackson vs. Ashton, 11 Peters, 249, the Supreme Court said, "No admission in an answer can, under any circumstance, lay the foundation of relief under any specific head of equity unless it be substantially set forth in the bill."

But if we were at liberty to consider the statements of the answer in connection with the allegations of the bill, the ground for passing the order under examination would be much less tenable than that shown by the bill itself, since there is not an averment in the bill, from beginning to end, sustaining the plaintiffs' claims, that is not flatly denied by McKee in his answer. Of course it would not be proper to separate the averments of the answer and rely upon a single admission, disconnected from all its other statements, and weigh that against McKee. In fairness, as in law, all parts of the answer responsive to the bill should be considered, and not an isolated part, and taking the entire answer, in connection with the averments of the bill, the case of the plaintiffs would be less favorable to them than if it depended solely on the bill.

We proceed to examine whether the averments of the bill disclose any ground for the exercise of equitable jurisdiction in the direction claimed. It was argued on behalf of the complainants that the bill invokes that jurisdiction upon the ground of the existence of an equitable lien in their favor. No such claim is made in the bill, in terms, and the word lien is nowhere mentioned. The bill is framed upon the idea that McKee had not yet drawn any part of the money, and its purpose was to enjoin him from drawing the amount, and to obtain a receiver who should hold the fund for distribution. The principal object was to prevent McKee from obtaining possession of the fund. The complainants rely principally upon paragraphs 27½, 28 and 29 of the bill as supporting their contention. The 29th paragraph charges that McKee had induced the Choctaw Nation to pass certain acts appointing him *the agent* of the said nation, to receive from the United States

any sums of money which might be appropriated to pay the judgment of the Court of Claims aforesaid. And that he has provided himself with apparent authority from the Choctaw Nation empowering him, in their name and behalf, to receive said moneys, and that he threatens to draw the money upon such warrants as may be issued.

This supposal of the bill was altogether at variance with the existing state of facts upon which the order was passed, for that is based upon the idea that McKee had then actually drawn out *part* of the money, and not as *agent*, but in his *individual character*.

In paragraph 27½ the complainants, after denying the validity of McKee's contract, aver that McKee and Blunt acquired no interest under the same (even if it was a valid contract) because it was therein stipulated that they should adjust the claims of all persons who had rendered services theretofore in the prosecution of the claims, and that they had made no such adjustment, and that if these parties had any interest under the contract (assuming its legality,) yet they were entitled to no such interest until they should first have adjusted said claims; and in the 28th paragraph it is charged that McKee is bound in equity and justice to satisfy and pay over to Lamon the sum he advanced, together with just compensation for his services, as well as to pay the plaintiffs for the services rendered by them and Jeremiah S. Black during the existence of the partnership.

Unless an equitable lien is claimed in some part of these sections, it is claimed nowhere. There is no pretense of an attorney's lien, and there is nothing in the facts out of which it could arise.

Assuming that we could sustain the present contention that an equitable lien can be considered as claimed substantially by the bill, when not charged in words, can we deduce such a claim from the language used? It is not enough to charge that a defendant owes a complainant money and had promised him to pay the debt out of a

particular fund, to justify an equity court to decree satisfaction of the amount out of that fund. Chancery does not undertake the function of the mere collection of debts. On such an issue a defendant is entitled to trial by jury; and a chancery court interferes with that right only under particular circumstances, as where an equity is shown to exist, growing out of a lien or trust. And such a lien must not only be alleged, but circumstances must be shown from which the court may be able to see that the allegation is justified by the facts set forth.

The Supreme Court has frequently announced its opinion upon this subject, and I will refer to a few of these decisions. In 21 Wallace, 437, the court says:

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence where the expectation of a contractor, that funds of his employer derived from specific sources, will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment, by the employer, of the right of domain over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is complete."

And again, in the case of *Trist vs. Child* in the same volume, it is said: "It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives

to the creditor a specific equitable lien upon the fund and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order and the payee may enforce payment of the amount against the drawee. But a mere order to pay out of such a fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order, or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor." See, also, *Porter vs. White*, 127 U. S., 344.

It is not in accordance with these decisions for a creditor to say that his debtor is insolvent, that he has learned he has a sum of money in a certain depository, and that he has promised again and again to pay the debt out of the very money, and has pledged his honor in the most solemn way to do so, to justify a court of chancery to lay hands on the fund. He must go further and show such assignment as amounts to an appropriation of a part of the fund. When this has been done the whole money does not belong to the debtor; for the part so assigned is the property of the creditor, and when this is made to appear it would be most unjust that the debtor who happens to have the right to draw the money should be allowed to do so, and retain it all to the prejudice of his creditor, the joint owner with himself.

We find no such state of case in the bill as can be recognized as a sufficient allegation of an equitable lien that a court ought to enforce. It is also urged at this hearing, that the jurisdiction may be maintained on the theory of a trust. The only sections in the bill that may be asserted to embody such a claim are those we have above referred to. Again, we remark that the word "trust" is not used in the bill. But if it had been used, or the idea had been embodied in other words, it would not be enough simply to assert the existence of a trust without a sufficient statement of facts to enable the court to determine whether the asser-

tion that a trust existed was authorized under the light of the circumstances set forth in the bill. The law on the subject, as to the necessity of such allegations in a bill, is thus stated in the case of *Van Weel vs. Winston*, 115 U. S., 237. In that case a defendant was charged with abuse of a trust, with abundant expletives of abuse. The court says: "The bill is a long one, the allegations are not classified, nor the true foundations of relief very clearly stated. It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives, of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or breach of trust, for which a court of chancery can give relief."

It seems to us, without now going more particularly into the examination of the particular language of the bill, that it is impossible to say there is such a charge of the existence of a trust made, or properly supported by accompanying statements, as would give jurisdiction to the court under this head of equitable relief. The charge in paragraph 29 that McKee had obtained from the Choctaws authority to draw the money, *as their agent*, and that he had provided himself with apparent authority, granted by the Choctaw Nation, empowering him to do so *in their name and behalf*, and that he threatens to draw the money, is the very opposite of any charge of such a trust on the part of McKee as is now insisted upon by the complainant in argument. Again, we were referred to the section of the contract in 1870 with McKee in which it is stated that Blunt and McKee are to adjust the claims of all parties who had rendered service theretofore in the prosecution of said claim. But we cannot perceive that this language in the contract, in the absence of any charge to that effect in the bill, when taken in connection with the language of the act under which

McKee's claim and duty were defined eighteen years afterwards, could be considered as a sufficient charge of a trust as against the fund in McKee's hands to justify the court in assuming jurisdiction on that ground.

It might be questioned whether there was not a fatal fault in the alternative method of pleading adopted by the complainants in dealing with this contract in their bill. A plaintiff is not at liberty to claim that an instrument is fraudulent and void and then claim under it. He must decide beforehand whether he intends to claim under it or against it, and not to shift his position in the way attempted here. A suitor cannot be allowed to "to blow hot and cold " after this fashion.

In the case of *Morrison vs. Shuster*, 1 Mackey, 194, creditors claimed the right to seize certain goods obtained by Shuster at a sale which they alleged was no sale, because conceived in fraud; and afterwards claimed the proceeds of the goods, when sold by Shuster's trustees; but the court refused to permit such contradictory claims.

If McKee made a contract with the Choctaw Nation under which he agreed to pay these plaintiffs the money claimed, he might be held liable in an action at law, or the Choctaw Nation itself, by proper proceedings, might be forced to make good the default of their agent.

It is a principle of equity that a trust is never implied or presumed or intended by the parties unless, taking all the circumstances together, that is the fair and reasonable interpretation of their actions. 2 Story's Equity, 1195.

In the absence of averment or proof of lien or trust, no jurisdiction existed in the Equity Court to pass the order, either upon the face of the bill or in connection with the averments of the answer considered with the bill.

It is not necessary to consider the other various objections made by the defendants to Cochrane's contract—that it is a contract purely personal—that it was conditional upon his performance of the whole work; that it was void

under the Act of 1853, and that this suit is really one against the nation. All these questions will more properly arise after the order we are here considering. Our duty now is simply to decide whether, as the case properly appeared before the justice below, he had jurisdiction to pass the interlocutory decree, and we pause as soon as we have discussed the two objections we have been considering, sitting here just as the equity judge below would have done if he were reviewing his own decision on this particular order, we postpone, as he would have done, the consideration of the other questions referred to, which may more properly be discussed after the testimony has been taken, and content ourselves with deciding that the court below had no jurisdiction to make that decree, and that it should be revoked.

The next matter before us in this case is presented by an appeal by McKee from the order of Judge Cox, directing him to be committed for contempt in not complying with the decree requiring him to pay the money into court. A motion was made to dismiss the appeal. We think this motion must be sustained.

In *Ex parte Fisk*, 113 U. S., 718, the petitioner had been committed for contempt by the Circuit Court of the Southern District of New York for refusing to produce his books, memoranda and contracts, to afford the plaintiff an opportunity to prepare his case for trial. He applied to the Supreme Court for a writ of *habeas corpus*, and the court, after deciding that the Circuit Court had no authority to pass the order, says:

"The jurisdiction of this court is always challenged in cases of this general character, and often successfully. There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such

orders; when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power. This principle has been uniformly held to be necessary to the protection of the court from insults and oppression, while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors. When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. It follows, necessarily, that on the suggestion of the prisoner that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, 'make inquiry into the cause of the restraint of liberty.'" See, also, *Ex parte Ayers*, 123 U. S., 485.

Under these decisions of the Supreme Court, this appeal will be dismissed. But as we have held the decree directing McKee to pay the money into court was without authority, for want of jurisdiction in the court, it results there could be no authority in that court to enforce obedience to that decree by proceedings as for a contempt.

The party against whom an attachment has been issued, not having the right to procure its rescission by an appeal from the order, must present his grievance in some other manner. In this cause the order for an attachment against McKee for alleged disobedience to the injunction forbidding him to draw the money from the Treasury, was revoked upon a motion made before the justice who ordered the attachment. In the two cases above cited, and in *Ex parte*

Terry, 128 U. S., 289, and in *Ex parte Savin*, the matter was brought before the court by petition for a discharge on *habeas corpus*. The order in the case of Bradley, who was disbarred for a contempt by a justice of this court, was reviewed upon an application for a mandamus.

As this cause is to be remanded, the court below, upon notice of this decision, will of course set aside the order for the attachment.

The next question presented in this case arises on the appeal of James R. Doolittle, from the order of the court refusing to admit him as a party defendant. On the 9th of September, 1889, this motion was filed in the Equity Court, unsupported by any explanation or affidavit.

"Now comes James R. Doolittle, by his solicitor, and moves the court for leave to be made a party defendant in the above entitled cause, and for leave to file an answer therein." On the 11th the judge passed an order that the motion be denied and overruled. On the 27th of that month an unsworn paper purporting to be Doolittle's answer to the bill was marked filed, sixteen days after the judge had decided that he could not be admitted to come in and file an answer. It could, therefore, have furnished no support to the motion, which should be by petition verified by affidavit, showing why the applicant has a right to come in and be made a party.

Indeed, upon the authorities, the right of a person to come in, as a matter of course, is one admitting of very grave doubt, and the courts when confronted by an objection from the parties have frequently declared no such right exists. *Gregg vs. B. & O. R. R. Co.*, 14 Md., 140; *Shields vs. Barron*, 17 How., 145; *Lewis vs. Darling*, 16 *Id.*, 8.

A complainant proceeds without all proper parties at his peril, for his bill will be dismissed or remanded by the appellate court for amendment, requiring new parties to be made, if it appears such have been omitted. The justification pleaded in this case for the application is that Lamon,

in paragraph 29 of the bill, avers that other persons than those above mentioned claim to have rendered services in the prosecution of the claim under such circumstances as to give them a right to a portion of said funds. That the plaintiffs are not able to state the nature of those claims, or to give the names of such persons, but they pray leave "when they shall have discovered the said persons that *they may be allowed to make them parties hereto*, and to insert herein in apt words setting forth the claims of such persons as these plaintiffs may be informed, in order that all such claims may be fully and finally determined and settled in this cause."

And it is said that this is an assent by the plaintiffs to the admission of Doolittle as a party. But the plaintiffs in that paragraph expressly reserve the right, *of themselves*, to make such parties by amendment of their bill, which is quite a different thing from the contention in behalf of Doolittle, that persons can come in without any action on the part of the complainant. Without deciding more than that the application before us is wholly insufficient in form to justify the leave asked, it is evident the order denying the motion is not an appealable order. Parties only can appeal, and Doolittle is not a party to this cause. Strangers to the proceeding can have no such right, and Doolittle's complaint, which he asks us to hear is, that the court would not admit him as a party.

We come now to the case of McKee against the widow and the executor of John T. Cochrane; Luke Lea; Gilfillan and Rawlings; the executors of Thomas A. Scott, Chauncey F. Black and Ward H. Lamon; and Latrobe, Stettauer, and Jacoway.

This bill was filed on the 20th of July, 1888, after McKee had drawn from the Treasury 25 per cent. of the money sought to be enjoined in case 11,238, as well as the \$14,410. It alleges that from the 16th day of July, 1870, McKee had been the agent and attorney of the Choctaw Nation in the

prosecution of its claim against the United States under a contract between said nation, Blunt and himself, securing to them 30 per cent. of what should be recovered, as compensation for their services; that as the fruit and result of his services, in accordance with a decision of the Supreme Court, he recovered judgment against the United States for \$2,981,247.30; that to secure payment of 30 per cent. of that amount for his services, the Choctaw Council passed an act, approved February 25, 1888, which stated at length McKee's connection with the claim in 1870; that he and Blunt prosecuted the claim until Blunt died, when McKee associated with himself Luce and other able lawyers to assist in its prosecution; that at the request of McKee the nation entered into a separate contract with Luce to pay him 5 per cent. of the amount recovered, which McKee stipulated should be credited upon the 30 per cent. previously secured Blunt and McKee; that McKee, by means of his own labors, and the aid and assistance of others, having recovered the judgment in favor of the nation, and fully performed his contract, became entitled to receive the sum in said contracts agreed to be paid; and in order to pay McKee and Luce the act made an appropriation for the payment out of said judgment of 5 per cent. of the amount to the representatives or assigns of John B. Luce, and 25 per cent. to the said McKee. The act further recited that two acts of the general council had been passed, requiring Le Flore to make such payments, and declared that it should be the duty of the treasury of the nation to make requisitions in favor of said McKee and Luce for the payment of said sums; and if the appropriation by Congress should be so made that the money can only be paid into the treasury of the Choctaw Nation, then it was made the duty of its treasurer to draw the requisite drafts to pay said money. Section 4 directed that the sum of \$14,140, acknowledged to be due to John T. Cochrane, by act of the general council of November 1, 1861, should be paid to

McKee in the same manner and at the same time the 25 per cent. should be paid to him.

Section 5 provided "that the payment therein directed to be made shall, when made, either under this act or said other two acts hereinbefore referred to, be taken and accepted as full and complete payment, and final discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claims against the United States."

The bill further alleged that an act of Congress was passed appropriating an amount sufficient to pay said judgment and interest, which was to be paid out upon requisition of the proper authorities of the nation, and in obedience to the act McKee drew from the treasury \$714,699.65, with interest, together with the \$14,140; that McKee and the representatives of Blunt claim no personal title or property interest in their own right in the 5 per cent. stipulated in the contract to be paid to Mrs. Cochrane out of the 30 per cent., nor does he claim any interest in the \$14,140; that said 5 per cent. from said 30 per cent. amounts to \$147,057.63, which, added to the \$14,140, makes a total of \$161,197.63, which the complainant offered and tendered to bring in and deposit according to the order of the court, the same to be disposed of under its future decree. McKee averred that Ellen Cochrane claims the said 5 per cent. as the widow of the said John T. Cochrane, and especially in virtue of the provisions of the said contract of the 16th of July, 1870; that McPherson, as executor of John T. Cochrane, claims the said 5 per cent., and also said \$14,140, alleging that the 5 per cent. was secured by the stipulation in said contract for services rendered to said nation, and that said sum should not be paid to the widow, but to the estate; that Luke Lea, in the interest of his assignees, claims a portion of said 5 per cent., and the said \$14,140 by virtue of a provision in the last will of the said Cochrane.

That James Gilfillan and John A. Rawlings claim the payment to them of the moneys declared to belong to Lea, by virtue of an assignment from him and of alleged authority held by them from Cochrane's executor; that the executors of the Scott estate claim \$75,000 out of the 5 per cent. for their services under certain contracts, referred to in the bill; that Lamon and Black claim an interest in the 5 per cent. and in the \$14,140, and in support show contracts between Cochrane and the nation, and between Cochrane's executor and Black; that the claim, set up by Chauncey F. Black to said 5 per cent., and \$14,140, is in virtue of his alleged partnership with his father at the date of said contract, and of alleged services by his father and his alleged co-partners under said contract; that the claim of Lamon is based in part upon his co-partnership with Black, and the services rendered by Black and himself under the contract, and also upon the alleged fact that he refunded to Scott \$25,000 of the \$75,000 alleged to have been advanced by Scott; that Latrobe claims by virtue of certain alleged contracts, and also represents that he rendered independent services in behalf of the nation. The bill also gives McKee's understanding of the nature of the claims of Stettauer and Jacoway; and further states the complainant is informed that other persons whose names are unknown to him, assert and make claims to some part of the money, but the nature, character and extent of such claims are not known to him; "and he prays leave, whenever the names of such parties, and the extent, character and interest asserted by them become known to him, to make such parties defendants by proper amendments. That as to the 5 per cent. and the \$14,140, in which he claims no interest in his own personal right, he cannot safely or properly undertake to determine or adjudicate, as between the said conflicting claimants to the fund, which of said claimants is entitled to said money or portions thereof; nor does he admit the truth of the allegations set forth by said claimants in support of their several claims;" that the claims set up by

Black and Lamon are not limited in amount to 5 per cent. and the said \$14,140, but their claim exceeds in amount the sum tendered, and includes a large part of the money belonging to the complainant and drawn by him from the Treasury; and the same may be true of the claims of others of the defendants; that neither the claim of Lamon, nor Black, to any part of the money, other than the money tendered, has any foundation in right or equity; nor has either of the defendants any right or claim to any part of the fund not therein tendered to the court, but that the entire residue of the same belongs to him.

He further states and asks that his bill may be regarded as a bill in equity in the nature of a bill of interpleader; tenders the said portions of the money in which he claims no interest to abide by the order and decree of the court in the premises. He prays the defendants may be required to discover what right or title they claim to the money tendered, and how they derive and make out their claim to the same; and that they may set forth to which of them the said moneys so tendered, and each and every part thereof, do of right belong and are payable, and that the defendants may interplead as to their rights to said fund; and further, that as to the money not tendered and drawn by the complainant from the Treasury, he may be adjudged and decreed to be entitled thereto in his own right; and further, that the defendants may be restrained and enjoined from prosecuting any other claim against him.

Answers were filed by different defendants, and among others, by Gilfillan and Rawlings, as the assignees of Lea.

The last named defendants afterwards filed their cross-bill, to which McKee demurred, upon the ground, among others, that a cross-bill would not lie to a bill of interpleader. This particular objection was overruled by the court below, which decided that McKee's bill was not a pure bill of interpleader, because the complainant therein prayed the court to decide that all of the money which he drew, except

the \$161,000, should be held to be his own money, such a claim being inconsistent with the idea of a bill of interpleader, the theory of which is that the complainant stands as a disinterested stakeholder, claiming no affirmative relief. But the court sustained the demurrer upon other grounds and dismissed the cross-bill, and from the order of dismissal an appeal was taken. The propriety of this order depends upon the question whether the cross-bill presented a proper case for equitable relief.

Justice Story states the principles applicable to the subject thus: "A cross-bill, when it seeks relief, which is of an equitable nature, should also contain all the necessary allegations which confer an equitable title to relief upon the party, for otherwise it will be open to a demurrer." Story's Equity Pleading, Sec. 630.

That cross-bills are not favored is well settled. 13 Howard, 69.)

In the cross bill, Gilfillan and Rawlings allege that the contract between Cochrane and the delegates of the nation was recognized by the Choctaws as one that was not to terminate, as ordinary contracts would, on the death of the attorney, but was intended by the Choctaws to continue until the collection of the claim; that the agency of Cochrane was coupled with an interest; that it was agreed the claim was to be prosecuted by the "heirs and assigns" of Cochrane even after his death, and by such attorneys as might be employed by him or them; that the Choctaws, in making the contract with Cochrane, annulled all previous contracts, and in afterwards approving the contract with Black they recognized the continued existence of the Cochrane contract; that the McKee contract was secured by deception on the part of McKee, in so far as it limited the amount due under the Cochrane contract to 5 per cent. of the 30 per cent.; that Gilfillan and Rawlings employed counsel and aided and assisted McKee in his efforts to recover said claim at the request of the Choctaws, all the

time laboring under the belief that McKee was also acting under the Cochrane contract, as McKee concealed its existence and made no objection to the aid and assistance of the complainants or their attorneys and counsel; and that they did not discover that such contract had been made until the case was before the Court of Claims, when McKee for the first time objected to the appearance of complainants as attorneys and made known the existence of said fraudulent and inequitable contract; that McKee obtained said contract by misrepresenting the extent of the services of Cochrane, and stated to the delegates that those interested in the Cochrane contract would be satisfied with the 5 per cent. provision; that Cochrane in his life-time had procured the submission of the Choctaw claim to the Senate of the United States, and the award and the partial appropriation of \$500,000; that the sum of \$14,140, as McKee well knew, was the result of the labors of Cochrane for work done prior to 1861, and was in part for recovering and collecting money in 1861, for which Cochrane was never paid a cent; and they insisted that the whole amount received by McKee was a fund for the purpose of paying all attorneys for services rendered, and especially the complainants, and that McKee was not a proper party to disburse the amounts and to fix the sums due to claimants; that besides the half of the \$14,140 and the 5 per cent. on the amount collected, which McKee should at once have paid over to Rawlings and Gilfillan, the balance should have been paid into court to await its adjudication and proper distribution: and they allege that the conduct of McKee as to the complainants was fraudulent; that they are entitled to a moiety of \$14,140, and one-fourth or more of the 30 per cent. on the balance of the amount collected by McKee.

They deny the claims of everybody else, insisting that Black's and Lamon's claim has no foundation in justice or law, and that none others of the parties, except McPherson, executor, and Mary Magruder, a legatee, and Ellen Coch-

rane, the widow of John T. Cochrane, and the complainant, have any interest in the fund.

They pray the court will adjudicate the rights of all parties interested, and will at once order the payment of the moiety of the \$14,140 over to them, and the moiety, or whatever balance of the fund may be in court; and that an account may be taken, showing what is the proper proportion of the 30 per cent. due to them; and that they may have a decree against McKee for the balance due; and they ask for the appointment of a receiver for the trust.

There is no allegation that the money appropriated by Congress is impressed with an equitable lien in their favor, nor any claim of any deferred amount as due to them; nor that Lea had ever been employed by the Choctaw Nation or by McKee; or that Gilfillan and Rawlings were so employed, or were named in any contract with the nation; or that there was any performance of Cochrane's contract, under which they claim. These are some of the omissions of essential matters, all or some of which are requisite to establish a claim to the relief sought.

Without pausing to discuss them at length, it is enough to say that after a careful consideration of all the averments of the cross-bill, we have arrived at the conclusion that it sets forth no such case of equitable lien or trust in favor of complainants as would justify the interposition of this court. True it is, a trust is alleged to exist in so many words, but we repeat, it is not enough simply to allege the existence of a trust; the facts supporting the allegation must be sufficiently set forth; and this is not done here; or if a lien is relied on it must be shown that it is of such a nature as amounts to a distinct appropriation of the money to the plaintiffs. The fact that they claimed the 5 per cent. which is also claimed by Mrs. Cochrane, as well as the \$14,140, in whole or in part, had clearly been set forth by McKee in his bill and in their answer, and no cross-bill was necessary to enable them to insist upon those pretensions.

They insist their further claim for services rendered by Luke Lea, and by themselves as his assignees, in the prosecution of the Choctaw claim, is secured by a trust in their favor under section 5 of McKee's contract, which declares that Blunt and McKee agree to adjust the claims of attorneys for services *heretofore* rendered. This contract was dated July, 1870. Gilfillan and Rawlings explicitly say that their services were rendered *to assist McKee*, but as McKee did nothing for the nation and was not employed until 1870, and only agreed to adjust the claims accrued *before that date*, the services rendered *to assist McKee*, which must have been performed after July, 1870, and could not come within the terms of that agreement. Whatever claim they may have against the Choctaw Nation for services after 1870, may be asserted at law; and if they have a claim against McKee it may be enforceable in the same way, but not under the cross-bill.

We refrain from deciding upon the other defenses made to the cross-bill; as, that the Cochrane contract was personal in its character, so that no power or right under it can devolve upon his assignees or heirs; that it was an entire contract, dependent upon the complete performance by Cochrane of his obligations under it, and that all claim under it perished with Cochrane's death, leaving the work incomplete; and the contract itself does not give any ground for action in a court of equity, because it is within the prohibitions of the Act of 1853. All we propose to decide now is that the cross-bill, upon its face, contains no proper allegations to sustain the jurisdiction of this court. If we were to express an opinion upon the other questions above-referred to, our decision would bind this court through the whole progress of this litigation. And no appeal would lie by any of the parties to the Supreme Court from an order dismissing the cross-bill, because it would not be in the nature of a final order. *Ayres vs. Carver*, 17 How., 598. It would thus be an injustice to the other parties who have

not joined in the cross-bill, if we should undertake at this stage of the case, while testimony is being taken, to decide the entire case.

The order dismissing the cross-bill will be affirmed for the reasons stated.

After the court had decided that a proper cross-bill would lie to McKee's bill upon the ground that it was not a pure bill of interpleader, McKee asked leave to amend his bill, and on the 21st of May the justice below gave him leave to strike out so much of the bill as made Luke Lea a defendant; to strike out the twenty-second paragraph of the bill; and also to strike out so much of the prayer of the bill as asks that as to the money, in excess of the \$161,000 tendered in court, it might be adjudged and decided that the complainant was entitled thereto in his own right. After this leave had been given the following motion was filed:

Ward Lamon being duly sworn, says:

"That on the 21st of May, 1889, certain amendments were made to the bill of complaint, by leave of the court first had and obtained; that the amendments so made to said bill make it necessary for the defendant to amend his answer heretofore filed, as he is advised by counsel that the proposed amendments of his said answer are fully set forth in the paper this day filed by him, and that he is advised by counsel, and verily believes that the amendments of his said answer, as proposed, are necessary for the protection of the rights of this affiant in this litigation, and that he cannot safely proceed to the trial of this cause without amending said answer as proposed by him."

The answer of Lamon to the amended bill had been filed four days before his motion was made.

The court passed an order denying the motion for leave to amend his answer, and from this order Lamon has appealed. We think the justice below was right in refusing to permit the amendment. It is a well settled principle of chancery law that courts are much stricter in allowing

amendments to answers than to bills, and it is only upon a very strong case and special circumstances that leave to amend an answer will be allowed. 1 Bland, 162.

Our rule 53, of the equity rules, provides that an answer may be amended, as of course in any matter of form, as by filling up a blank, or correcting a date, or reference to a document, or in any other small matter, and be resworn at any time before replication or before the cause is set down for hearing upon bill and answer. But after replication, or such setting down for hearing, it shall not be amended in any such matter without leave of the court; nor in any material matters, as by adding new facts or defenses, or qualifying, or altering the original statements, except by special leave upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit.

It is very plain from these provisions the court intended to observe strictness in the making of amendments. Unless the court should restrict the leave to amend answers it would frequently happen that after a defendant has filed his answer under oath, he might take advantage of some subsequent development in the case, and change his answer by the introduction of new matter and different defenses, even after issue joined and testimony taken, to the great delay and expense of the other parties. Mr. Lamon states that the amendments to the bill of complaint have made it necessary for the defendant to amend his answer. The first amendment to the bill was simply to strike out so much of the thirteenth paragraph and of the prayer as referred to Luke Lea and made him a party. There is nothing new in that requiring an amendment of Lamon's answer. The next amendment was to strike out the twenty-second paragraph. How the striking out of that paragraph can render it necessary for Lamon to say anything additional to his answer we cannot very well see. It might have furnished a ground for an application to strike out his answer to the twenty-seventh paragraph, but not for

adding something to it. We have examined paragraph twenty-two, as it stood in the bill originally, and can perceive no reason why its omission by the amendment can render it necessary that Lamon should be allowed to add several pages of new matter to his answer because McKee, to the extent of that paragraph, has limited the scope of his bill by its omission. Especially would Lamon's amendment be improper in view of the character of the amendment, as disclosed by the proposed answer.

We see nothing in the cause shown, why this exceptional privilege should have been given, and we think the justice below properly exercised his discretion in refusing the application.

Lamon also presented an appeal from the interpleader decree without assigning any particular reasons in its support. We do not think the decree obnoxious to any of the objections made at the hearing here. It recites the former proceedings and declares that the bill of interpleader as amended is properly filed, and directs the defendants to interplead and adjust between themselves their respective rights or claims to the money paid into the registry of this court by the complainant with his bill. And it further orders and decrees that the defendants named in the complainant's amended bill should be perpetually enjoined and restrained from instituting or prosecuting any action or proceeding either at law or in equity, against said complaint for the recovery of the money so paid into court.

The object of filing the bill was that he might not be harrassed by all the complainants in conflicting suits which might be brought in respect of that decree by the different claimants. The decree further provides that the complainant, having brought that money into court, should be dismissed as a party to that suit. A complainant in a bill of interpleader has no right to be dismissed, unless the case is at issue. But when that stage has been reached, he has the right to ask such a decree. The very object of such a bill

is to obtain leave to deposit the money and allow the contest to go on between the rival claimants. But such a decree should not acquit him of accountability for any other moneys he may have received; and accordingly the decree below, while declaring the complainant be dismissed as a party to this suit, with his costs, further ordered that the decree was made without prejudice to the right of any and all of the defendants to institute any action at law or in equity to recover from the complainant any demands any of them may have for amounts due from him over and above the money so paid into court. And it further ordered that the respective answers of the defendants already filed in this cause should be taken and considered as the interpleading previously decreed.

We think the decree was a proper one, justified, as far as we can see, by the facts as disclosed at that time, and it is affirmed.

A motion was made by Doolittle in this case for leave to be admitted as a party, which was denied. We have decided in the previous case this was not an appealable order, and the appeal will be dismissed.

The same disposition must be made of the appeal from the order below, appointing Mr. Ingle as examiner to take testimony as to the proper disposition of the \$14,400. This was clearly a matter within the discretion of the court, and from it no appeal lies. We can see no objection to the order, which, so far from delaying the cause, as was argued, may have the effect of expediting it.

We will sign a decree according to the principles of this decision.

The Chief Justice dissents from parts of this decision.

PETER H. HILL

vs.

THE DISTRICT OF COLUMBIA.

1. The payment of money to an official to avoid an onerous penalty, though the imposition of the penalty may be illegal, is such an involuntary payment as entitles the party paying it to maintain an action for its recovery.
2. In such an action it is not necessary for plaintiff to show that he made the payment under an immediate and urgent necessity to avoid the infliction of the penalty.
3. Whether the payment was voluntary or involuntary, is a question of fact to be determined like other questions of fact and not by arbitrary rule.

At Law. No. 28,011. Decided December, 1899.
Justices HAGNER and JAMES sitting.

MOTION for a new trial on a case and bill of exceptions.

THE FACTS are sufficiently stated in the opinion.

Mr. GUION MILLER for plaintiff:

The Supreme Court of the United States, affirming the Supreme Court of the District, declared these acts imposing licenses on commercial agents unconstitutional and void. *In re Hennick*, 7 Cent. Rep., 263; *Stoutenburgh vs. Hennick*, 129 U. S., 141.

A payment made under circumstances of this kind is not such a voluntary one as to preclude recovery. *United States vs. Lawson*, 11 Otto, 164; *United States vs. Ellsworth*, 11 *Id.*, 170; *Swift vs. United States*, 111 U. S., 22; *Lambourn vs. Dickinson Co.*, 97 *Id.*, 181; *Harvey vs. Olney*, 42 Ill., 336; *Catoir vs. Watterson*, 38 Ohio State, 319; *Cooley on Taxation*, 568, 569; *Allen vs. Burlington*, 45 Vt., 202; *Tuttle vs. Everett*, 51 Miss., 27.

The contention of the defendant that in order to recover there must be at the time of payment actual seizure or detention of the person, or such threats of immediate seizure as to indicate a *bona fide* intention to carry the same into

immediate execution, cannot be maintained in view of the above decisions, and such claim is expressly refuted by the recent decision of the Supreme Court of the United States in the case of *Robertson vs. The Frank Brothers Company*, decided October 28, 1889. Speaking of the decision in *Maxwell vs. Griswold*, 11 How., 242, where it was held that the payment by an importer was not voluntary because made in order to secure possession of his goods, the court say that while that was an important feature "it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law."

"Where such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary."

* * * "Where the duress has been exerted by one clothed in official authority, or exercising a public employment, less evidence of compulsion or pressure is regarded. * * * In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one."

The judgment of the Criminal Court imposing the fine was void, and the money could, therefore, be recovered in this action. *Elliott vs. Piersol*, 1 Peters, 328; *Wilcox vs. Jackson*, 13 *Id.*, 511; *Williamson vs. Berry*, 8 How., 540.

Even though there had been no protest, the plaintiff could have recovered in this action, because the payments were made under duress, and in view of the penal provisions of the statute.

In such cases no protest is necessary. *United States vs. Lawson*, 11 Otto, 164; *United States vs. Ellsworth*, 11 *Id.*, 170; *Swift vs. United States*, 111 U. S., 22; *Bank of the United States vs. Bank of Washington*, 6 Peters, 8; *Rob-*

ertson *vs.* The Frank Bros. Co., decided October 28, 1889 ;
County of La Salle *vs.* Simmons, 5 Gilman, 10 Ill., 516.

Mr. H. E. DAVIS for defendant.

Mr. Justice JAMES delivered the opinion of the Court:

This is a suit to recover back moneys paid to the District as license fees, in pursuance of the act of the late legislative assembly, entitled: "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," approved August 23, 1871, and of the amendment thereof, approved June 20, 1872.

The plaintiff was engaged in the business of a commercial agent, selling goods by sample or catalogue, for dealers outside of the District to merchants here, to be delivered after sale by such outside dealers to the purchasers here; and for six successive years, from the year ending April 1, 1882, to the year ending April 1, 1887, inclusive, paid an annual license-tax of \$200. This suit is brought because this license tax has been held to be unconstitutional.

The defendant pleaded the Statute of Limitations, and that these payments were voluntary. The plea of limitations was sustained as to the first three payments, but verdict and judgment were had by the plaintiff in the Circuit Court as to the second three; that is to say, for the payments made for the years ending April 1, 1885, 1886, and 1887. The defendant's motion for a new trial was overruled by the trial justice, and defendant's appeal from that decision now comes before us by case stated and bill of exceptions.

The plaintiff testified as a witness in his own behalf, that he took out a license, paying therefor the sum of \$200, in the years 1881, 1882 and 1883, respectively: "That in 1884 he refused to take out a license, was arrested, prosecuted, fined in the Police Court and took an appeal; that on the trial of said cause on appeal, on October 28, 1885, he was adjudged guilty, fined the sum of \$200, and paid the sum to the United States Marshal for the District of Columbia; that he protested from year to year to the Commissioners of

the District about said license-tax because he thought the same was unjust; that on being notified about the license-tax due for the year beginning the 1st of April, 1885, that unless he paid such license he would be subjected to arrest, he took out a license for said year, paying \$200 therefor; that he would not like to say whether he had been arrested for the non-payment of the license-tax for any other year than the year of 1884, but the records would show as to that. The licenses for the year 1885 and 1886 were produced, and each bore a memorandum that the tax was paid under protest. Mr. Montague, the license clerk of the District, testified that these indorsements were made by him.

Upon the close of the plaintiff's evidence, none being offered by the defendant, both parties asked for instructions. The prayers of the plaintiff were at the time granted, but the court, after charging the jury, stated that the prayers on both sides might be considered to be refused. The appeal brings before us, therefore, only the refusal of the court to give the instructions asked by the defendant. They were as follows:

"The jury are instructed that unless they find from the evidence that the payments claimed to have been made by the plaintiff were so made by him to prevent an immediate seizure of his person or property he is not entitled to recover in this action.

"The jury are instructed that the plaintiff is entitled to recover, if at all in this action, only for such payments alleged by him to have been made as were, in fact, made under an immediate and urgent necessity therefor, or to prevent an immediate seizure of his person or property.

"The jury are instructed that in order to entitle the plaintiff to recover in this action they must find from the evidence that the payments alleged in the declaration to have been made by him were, in fact, made in order to release his person from detention or to prevent a seizure or detention of his person, immediately threatened, under circum-

stances indicating a *bona fide* intention on the part of the person making such threat to carry the same into immediate execution; and if the jury find from the evidence that any of said alleged payments were made by the plaintiff under other conditions than as hereinbefore indicated, as under a mere general warning or belief that he must so pay or undergo prosecution for not so doing, he is not entitled to recover in this action for such payment."

It was insisted, by counsel for defendant, that his prayers embodied precisely the rule laid down by the Supreme Court of the United States in *Railroad vs. Commissioners*, 98 U. S., 543, 544. In that case the court, referring to their decision in 97 U. S., said:

"We had occasion to consider the same general subject at the last term in *Lambourn vs. County Commissioners*, 97 U. S., 181, which came up in a certificate of division from the Circuit Court for the district of Kansas. As that was a case from Kansas, we followed the rule adopted by the circuits of that State, which is thus stated in *Wabaunsee County vs. Walker*, 8 Kans., 431: 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.' This, as we understand it, is a correct statement of the rule of the common law. There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances."

As a matter of fact the effect of the rule just quoted was materially altered by the manner in which it was divided into separate propositions in the defendant's prayers. Under the rule, as stated by Chief Justice Waite, any one of several predicaments might show that a payment was involuntary ; while, as directed by these prayers, the rule would make the character of the payment depend upon the presence of one particular circumstance. For this reason, if there had been no other, it would not have been proper to give these instructions as asked.

But we do not rest our decision on that ground. The law on this question has been differently and better stated in later decisions of the Supreme Court, and it is with reference to these that we hold that the instructions asked by the defendant were properly refused.

It is not easy to do justice to this extremely interesting development of principle without an examination of the cases referred to. The first of the series is *United States vs. Lawson*, 101 U. S., 164. The act of 26th of February, 1867, 14 Stat., 410, abolishing a former collection district in Maryland, and forming from a former portion thereof a new district, provided that the collector should receive an annual salary of \$1,200. Lawson held the office of collector from April 19, 1867, until April 1, 1875. On July 18, 1867, two months after his appointment, the Commissioner of Customs required him, in writing, to account for all fees received by him as such. He accordingly thereafter paid them into the Treasury. Lawson brought suit in the Court of Claims to recover these fees, and on appeal to the Supreme Court it was held, (1) that in addition to his salary, he was entitled to the fees and emoluments allowed to such officers by pre-existing legislation ; in other words, to the fees which he had paid into the Treasury ; (2) that, having paid them into the Treasury pursuant to a peremptory order of his superior officer, he was not thereby precluded from recovering them in a suit against the United States.

Mr. Justice Clifford, delivering the opinion of the court, said: "It is contended by the United States that payments were voluntarily made, and that the money cannot be recovered back. Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that if he refused to obey, *the refusal would cost him his commission*. Had he refused to comply with the order, or entered a protest, his act might have been regarded as contumacious, *and have proved injurious in its consequences* to the incumbent of the office as if he had declined to discharge the ordinary duties of the collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we cannot hold that the payments were voluntary within the meaning of the judicial rule which, in consequence of the payment, deny to the party making the same, the right to recover it back. Beyond all question the money was wrongfully exacted, and it is equally certain that in equity and good conscience it ought to be returned. * * * It was demanded of him by his official superior, and the act of Congress exposed him to a penalty if he refused to comply. 14 Stat., 187; Rev. Stat., Sec. 3619."

In the case of *United States vs. Ellsworth*, 101 U. S., 170, immediately following, a collector had paid into the Treasury certain fees to which he was entitled. Again the court said: "You will bear in mind, said the Commissioner, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited." Had he added, "If you fail to comply, the law must be enforced," his meaning could not be misunderstood, as the Act of Congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable, without any abatement, &c. Rev.

Stat., Sec. 3617. Penalties are prescribed for non-compliance with that requirement as follows: "Every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office, and to forfeit any part or share of the moneys withheld, to which he might otherwise be entitled." Rev. Stat., Sec. 3619.

"Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the Commissioner, cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

It is very clear that these cases went beyond the rule laid down in *Railroad vs. Commissioners*, 98 U. S., 543, 544. The collector's office was not his "property," and he could not well be said to have made the payments under circumstances of "immediate and urgent necessity." Nor was it an essential and differentiating circumstance that the Commissioner of Customs was the superior officer of the party making the payment. The principle of the decision was that he was dealing with one who could cause, and was likely to cause, him serious loss if he refused to pay. It was for the reason that he parted with his money when he was not free to choose that the payment was not voluntary in contemplation of law.

The next in this series of cases is *Swift Company vs. United States*, 111 U. S., 22. It is convenient to adopt the statement of this case made by Mr. Justice Bradley in *Roberts vs. Frank Brother's Company*, decided at the last term of the court (October, 1889), and not yet reported in the books. "In *Swift Company vs. United States*, the plaintiffs, who were manufacturers of matches, and furnished their own dies and stamps used by them, and were thereby entitled to a commission of 10 per cent. on the price

of such stamps, accepted for a long period their commissions in stamps (which, of course, were worth to them only 90 cents on the dollar), and they did this because the Treasury Department would pay in no other manner. We held that the apprehension of being stopped in their business by non-compliance with the Treasury regulations was a sufficient moral duress to make their payments involuntary." Mr. Justice Matthews, delivering the opinion of the court, said: "The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand, of necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer the question in the negative. *The parties were not on equal terms.* The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or rather value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria*." Mr. Justice Bradley then added: "In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, *though the imposition of that penalty might have been illegal*, was sufficient to make the payment an involuntary one."

It is manifest that these later cases relieve the question of voluntary and involuntary action from the artificial tests formerly applied, and that they recognize more distinctly the ordinary considerations which control human conduct. To say that a man who pays money must be held to have acted freely unless he did it under the pressure of *immediate and urgent necessity*, suggests a high standard of pluck and manhood, but in transactions with the Government it is not a fair or reasonable test. When a demand is made by an official, known to have at his back, even though he may not threaten to use them, the penalties of the law, the individual

citizen does not stand on an equal footing in the dealing. Accordingly, great weight was given in Lawson's Case to the fact that he saw in the distance a peril which menaced, not his existing property, but his future career and interests. It is useful, no doubt, to employ standards in determining the nature of conduct, but after all this question of voluntary or involuntary payment is one of fact, and should be determined like other questions of fact, and not by arbitrary rule.

In the light of the later decisions of the Supreme Court, we think that the trial justice was right in declining to give the instructions in the form asked by the defendant, but that he might well have declined to give them in the very form recognized in the case referred to by the defendant—*Railroad vs. Commissioners*, 98 U. S., 541—provided he stated the rule correctly in his charge to the jury. And this, we think, he did.

The decision of the trial justice in overruling the motion for a new trial is, therefore, affirmed.

M. D. BERLITZ ET AL.

vs.

CHRISTIAN STRACK.

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1. Where before the final hearing of a cause on appeal efflux of time has rendered the relief sought by the bill futile, the court will refuse to pass upon the question submitted.
 2. It *seems*, however, that where one fully understands the contract he is entering into he may lawfully bind himself, for a fair consideration, not to pursue his vocation within reasonable limits as to time and place.

In Equity. No. 11,069. Decided December 9, 1899.
Justices HAGNER, JAMES and BRADLEY sitting.

APPEAL from a decree refusing an injunction.

THE FACTS are stated in the opinion.

MR. CALDERON CARLISLE for plaintiff:

The only point in the case, as it seems to us, and the only one in which the complainants have any interest is the legality and validity of the contracts under which they employ all their teachers.

It is easy to show how important the provisions of these contracts are for the proper preservation and protection of a business which complainants have built up by their energy and industry, and at much expense of time and money in various cities of the United States. If they have not the right to stipulate with the teachers whom they employ, before they introduce them into the schools which they have established, and to the pupils whom they have secured or may secure, that in case said teachers leave their employ they shall not, for a certain limited time and in a certain limited space, teach the foreign languages, their whole enterprise would be at the mercy of designing persons. The Berlitz method, which is particularly discussed in the answers of Strack and in the testimony, may or may not be

a valuable aid to the teaching of the languages, but the undertaking of the defendant is absolutely not to teach the languages nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person that advertises to teach them in Washington, D. C. (and in certain other places), nor within 10 miles from said city, for the space of two years after the termination of the contract—under the first contract until June 1, 1887, under the second until June 1, 1889.

A reasonable interpretation of the contract would, of course, confine the meaning of the words "the languages" to those languages taught by the complainants in their schools, and it is not sought to extend the defendant's engagement beyond its fair and reasonable meaning.

The agreements of defendant are clearly such as a court of equity will enforce by injunction.

"A class of negative covenants which the court will enforce by injunction are covenants in partial restraint of trade where the limitation is reasonable." Kerr on Injunc., 507. See, also, page 534, par. 60.

These agreements, which are in partial restraint of trade, are clearly reasonable. Their sole purpose and object is the protection of complainants.

"We do not see," says Iredell, chief justice, in the case of *Horner vs. Graves*, 7 Bingham, 743, "how a better test can be applied to the question, whether reasonable or not, than by construing whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." See instances and cases cited by Kerr on Injunctions, 512, 513.

The rule established by modern decisions is, in effect, as follows: An agreement not to carry on a particular trade or business is a valid contract if it satisfies the following conditions:

1. It must be founded on a valuable consideration.

2. It must not be unlimited as to the space.

3. And the restriction must not act beyond what, in the judgment of the court, is reasonably necessary for the protection of the other party, regard being had to the nature of the trade or business. See case of *Mitchell vs. Reynolds*, 1 Smith, Leading Cases. *Navigation Co. vs. Windsor*, 20 Wall., 64 to 67; *Hitchcock vs. Coker*, 6 A. & E., 438; *Mallam vs. May*, 11 M. & W., 667; *Davis vs. Mason*, 5 T. R., 118.

Mr. D. W. GLASSIE for defendant:

Defendant was employed to teach German in plaintiffs' school at Washington, according to the Berlitz method, and agreed to "do his utmost to learn that system of teaching and conscientiously employ the said method;" and, as plaintiffs claimed a property in said method, defendant was willing to, and would naturally agree, not to teach according to that method in the cities named in Article 12. But, clearly, plaintiffs had no right to require the defendant to, and defendant never would have consented to agree not to teach the German language according to the old or any other method or system. Such a contract could bring no advantage to the plaintiffs, and would work a hardship upon the defendant and the public, and would be contrary to public policy and be vicious and void. *Chappel vs. Brockway*, 21 Wend., 157; *Brewer vs. Marshall*, 4 C. E. Green, 547; *Keeler vs. Taylor*, 53 Pa., 469; *Mitchell vs. Reynolds*, 1 P. Wm., Ch., 181; *Kimberly vs. Jennings*, 6 Sim., 352. Particularly when oppressive to one party without being of benefit to the other. *Heichew vs. Hamilton*, 3 G. Green, Iowa, 598; *Ross vs. Sadgbeer*, 21 Wend., 166.

An injunction to restrain trade will not be granted until the right on which the claim is founded has been settled by law. *Citizens' Coach Co. vs. Camden Horse R.R. Co.*, 2 Stew. Eq., 304; *Mandeville vs. Hannan*, 5 Cent. Rep., 625.

Mr. JUSTICE HAGNER delivered the opinion of the Court:

The bill in this case was filed by certain persons alleging

themselves to be members of a co-partnership, styled "The Berlitz School of Languages." It alleged that the firm, on the 26th of June, 1886, entered into a contract with Strack, the defendant, a teacher of foreign languages, by which, for an agreed consideration, he undertook to teach German in their school in Washington from October, 1886, to June 1, 1887, and in the event of his leaving their employment before, at, or after the last-named day, either voluntarily or by dismissal, he bound himself not to teach any foreign language in Washington, Boston, Brooklyn, or New York City, nor within 10 miles from said cities, until June 1, 1889; that the business of said firm is to teach foreign languages according to a certain method, which is their property, and the defendant in said contract bound himself to learn that method and teach languages in accordance with it; it was also agreed that he might leave their employment after a written notice of thirty days, but by the surrender of part of the agreed salary; that he had previously entered into a similar contract which expired on the 1st of June, 1886; that he was retained in their employment under the second contract until September, 1886, when he voluntarily left their employment; that from that time, in disregard of his contract, he has been teaching and is still teaching in Washington, in schools and otherwise, foreign languages according to the Berlitz method or otherwise, and the bill prays for an injunction to prevent him "from teaching foreign languages in the city or within the District of Columbia."

The defendant answered the bill, and also separately showed cause why the injunction should not issue. The Equity Court, on the 30th of August, 1887, passed an order enjoining him "from teaching those foreign languages which are described and embraced in the methods of complainants, which is referred to and described in the bill in this case, in the city of Washington during the pendency of this suit." Testimony was taken, and on the 15th of Feb-

ruary, 1888, at final hearing, the equity justice passed a decree dissolving the restraining order and dismissing the bill with costs; and further ordering that the cause be referred to the auditor, who was directed to take proof and ascertain and report what damages, if any, the defendant has sustained and suffered by reason of suing out the injunction in this cause, and the cause was retained for the purpose of disposing of this question; and pending the hearing of the cause on appeal, the defendant should be restrained from teaching languages in the District of Columbia, *according to the Berlitz method*, on plaintiff entering into an undertaking to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably obtaining this injunction. The appeal from this order was argued here in May last. Justice Bradley was with us in the case, but his engagements in the Criminal Court prevented the case from being disposed of before that term adjourned. Since the commencement of the present term he has been seriously ill, and we have been waiting until we should have the pleasure of seeing him here in renewed health. To render a decision upon the merits of the main question of the controversy is not permissible, because the case is dead, so far as that question is concerned. The 1st day of June, 1889, the limit within which the defendant is charged to have bound himself not to teach, occurred very soon after the argument; and that of itself was one reason why a decision was not hastened, as it was seen no practicable result could flow from such a decision. It is proper, however, to dispose of the remaining feature of the case, and we shall proceed to do so. The defendant insisted that under the contract he was only required to refrain from teaching during the designated period, *according to the Berlitz method*; and not that he should abandon his right to earn his subsistence by teaching foreign languages in any other method, and he denies that he has used the Berlitz system since he left the school. This construction

of the contract, and the questions of fact presented by his defense, are disputed by the complainants, but are not questions that we can at this trial decide, because it would be simply deciding moot questions. He also insists that he was released from the contract by the complainants before the time fixed for its commencement.

The justice who granted the preliminary injunction, adopted the construction of the contract insisted on by the complainants; namely, that the defendant had bound himself not to teach the languages by any method during the time limited. The justice holding the Equity Court at the final hearing after the testimony had been taken, differed from the opinion of his predecessor, and held that all the contract required was that the defendant should not teach according to the Berlitz method, and although he passed a decree dismissing the bill he indicated that this was his opinion in the last paragraph of the decree. The contention on the part of the defendant was that the contract, even in this view of its meaning, should not be enforced, because it is against public policy to uphold a contract by which a man binds himself to live in idleness and run the risk of becoming a public charge. This we have said, that we cannot determine in the present condition of the case, although we do not wish to be understood as deciding that a man cannot make a contract that he will not pursue his vocation within reasonable limitations as to time and places. If one, *sui juris*, makes such a contract, with his eyes open, upon fair consideration, the courts cannot undertake, at his request, to annul it. Courts do not make bargains for men; it may do so for idiots, lunatics, and children, but not for grown children. The decree below retained the cause for the purpose of allowing the auditor to take proof as to what damages the defendant sustained by reason of the suing out of the injunction. This, we think, was correct. The following decree, somewhat modifying the decree below, will be passed by this court:

This cause coming on to be heard was argued by the respective counsel; and the proceedings having been by the court read and considered, it is therefore, this 9th day of December, 1889, by the court, adjudged, ordered, and decreed that the complainants are not entitled to recover against the defendant for the alleged breach of contract specified in the bill of complaint, and that the relief prayed therein be, and the same is hereby, refused. It is further adjudged, ordered, and decreed that said bill is retained for the purpose specified in the decree of the Equity Court and for no other purpose; and that said decree referring the cause to the Auditor to take proof and report to the court what damage, if any, the defendant has sustained, by reason of the complainants having sued out the injunction, be, and the same is hereby, affirmed; and the cause is remanded to the court below for the purpose of taking such account.

ELIZABETH PIERCE ET AL.

vs.

AUGUSTUS JACOBS.

1. Two joint tenants of real estate conveyed the property to trustees to secure the payment of a debt. Afterwards, the debt being paid, the trustees reconveyed the estate to them as tenants in common. *Held*, in an action of ejectment, that it was immaterial that the trustees may have committed a breach of trust in reconveying to their grantors a title differing from that which they had held before the creation of the trust. This action deals only with the legal title, and a conveyance by a trustee, even in disregard of his duty has the usual legal effect of a deed.*
2. Parties to a suit are made by the statute competent as witnesses to prove any fact admissible in evidence; it is not error, therefore, to permit the plaintiff in ejectment to prove by his own testimony his relationship to the ancestor under whom he claims; the rule as to proof *aliunde* in matters of pedigree does not exclude parties as witnesses. It only requires proof *aliunde* the declarant.
3. The records in the office of the clerk of the Circuit Court of the District of Columbia showed that plaintiff's ancestor made a declaration, on the 10th of December, 1835, of his intention to apply for letters of naturalization, but no record of his admission to citizenship was found. *Held*, inadmissible to show (for the purpose of proving that he must have been subsequently admitted to citizenship) that the applicant afterwards voted without challenge at several elections held in the District; such evidence would only be admissible for that purpose after proof going to show the loss of the record, such as that the clerk's office had been searched for the records of naturalization proceedings had during that period, and that they could not be found.
4. When the plaintiff in the ejectment claims as heir, he is not confined to proving the marriages of parents and grandparents by producing the record, or certified copy thereof, of such marriages, or by the testimony of a witness present at the ceremony, or by proof of the declarations of deceased persons related by blood or marriage, but he may make proof of facts from which such marriages may be inferred. *Green vs. Norment*, 5 Mackey, 80, affirmed as to this rule.

At Law. No. 24,606. Decided December 19, 1887.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Motion for a new trial on a bill of exceptions taken in an action of ejectment.

Messrs. WORTHINGTON & HEALD for plaintiff.

Messrs. S. T. THOMAS and C. E. NICOL for defendant.

*The same point was decided in *O'Day vs. Vansant*, 2 Mackey, 273.

Mr. JUSTICE JAMES delivered the opinion of the Court:

This is an action to recover a lot in the city of Washington, in which the plaintiffs, Elizabeth Pierce and Ann Hayes claim an undivided one-eighth interest as heirs of one John Downs. The question presented by the first bill of exceptions related to proof of the ancestor's title. The plaintiffs first offered in evidence a deed to John and William Downs a deed executed by them to trustees to secure payment of the purchase-money, and a deed of release by the trustees, purporting to reconvey the estate to them as tenants in common. To the admission of this last mentioned deed the defendant excepted, on the ground that the grantors in the trust had an estate of joint tenancy, and that a reconveyance to them as tenants in common was inadmissible to show title of a different kind in them, unless supplemented by testimony that they directed the execution of the deed of release in that form. We think that objection was properly overruled.

It is immaterial that the trustees may have committed a breach of their trust in reconveying to their grantors a title differing from that which they had held before creating the trust. This action deals only with the legal title, and a conveyance by a trustee, even in disregard of his duty, has the usual legal effect of a deed. *Williams vs. Jackson*, 107 U. S., 482; *Taylor vs. King*, 6 Munf., Va., 358; *Den. vs. Trautman*, 7 Ired., N. C., 155.

It was not necessary that the grantors of the trust should give directions that the reconveyance to them by way of release should create a tenancy in common; the trustees' deed would have that effect at law, and they would continue to hold as tenants in common until they should proceed in equity to have a correction of the title.

It appears by the second and third bills of exceptions that Elizabeth Pierce and Mrs. Hayes, the plaintiffs, were examined as witnesses to prove facts showing their relation by descent to John Downs, and that the defendant took an

exception on the ground that their relation to the family of John Downs must first be shown *aliunde*. The object of the objection seems to have been to invoke the rule which excludes declarations in regard to family matters until it has been shown *aliunde* that the declarant was a member of the family. The rule as to proof *aliunde* does not exclude parties as witnesses. It only requires proof *aliunde* the declarant, and the statute has made parties competent to prove any fact admissible in evidence. The plaintiffs were as competent as any other witnesses could have been to prove facts from which the jury might be allowed to deduce their alleged relation to John Downs. The second and third exceptions were, therefore, properly overruled.

The fourth exception was taken to the refusal of the court to instruct the jury at the close of the plaintiffs' testimony, that they must find a verdict for the defendant, because there was no sufficient evidence of the marriage of the plaintiffs' parents and grandparents; that is to say, no sufficient evidence to show a common ancestor of themselves and John Downs, from whom they claimed to derive the estate in question by descent. It is not material to recite the particulars of the testimony produced by the plaintiff to establish this point. It is enough to say that it was sufficient to make out a case *prima facie* under the rules laid down by this court in the case of *Green vs. Norment*, 5 Mackey, 80, to which we adhere with confidence. The court was right, therefore, in refusing to instruct the jury as prayed.

The fifth bill of exceptions raises the question of the sufficiency of certain evidence to show that John Downs, from whom the plaintiffs claim to derive title by descent, was, at the time when he acquired *his* title, a citizen of the United States.

The Maryland Act of 1791, Ch. 45, Sec. 6, provided "That any foreigner may, by deed or will hereafter to be made, take and hold lands within that part of the said territory (*viz.*, of Columbia), which lies within this State, in the same man-

ner as if he was a citizen of this State, and the same lands may be conveyed by him, and transferred to, and be inherited by, his heirs or relations as if he and they were citizens of this State." This act was in force in this District. According to the construction given to it by the Supreme Court of the United States in *Spratt vs. Spratt*, 1 Peters, 843, the plaintiffs, who were aliens at the time of John Downs' death, that is to say, when their capacity as heirs would begin, could inherit from him if he acquired this land as an alien, but could not so inherit if he acquired his title after becoming a citizen, inasmuch as the statute did not apply to the latter case, and, therefore, left it to be governed by the common law, which denied inheriting capacity to aliens.

It appears by the bill of exceptions, that the records of the Circuit Court of the District of Columbia show that John Downs made, in the office of the clerk of the court, on December 10, 1835, a declaration of his intention to apply for letters of naturalization; and evidence was received tending to show that, during several years after the expiration of two years from that time he voted at certain elections in Washington City, but no record of his admission to citizenship is found. It was urged at the argument that, notwithstanding the record of admission to citizenship which the statute required to be made is not found, it was competent to show by parol proof, after so great a lapse of time, that Downs must have been so admitted. In support of this proposition the defendant cited *Hogan vs. Kurtz*, 94 U. S., 778. In that case the court said: "Proceedings of the kind are required to be recorded, but it was proved or conceded that the records of such proceedings in this District were destroyed many years ago; and *in view of that fact*, and of the long period between the purchase of the property and the other evidence exhibited in the record, the court left the question whether the party was not naturalized to the jury." The assumed loss of records was a material element in the conclusion of the Supreme Court. The argument

was that the record alleged to have existed might have existed and been lost, since records known to have existed were thus lost; and then the conduct of the party, in claiming to have been naturalized, that is to say, in assuming the original existence of such a record, was admitted as showing that what might have happened had happened. The strain of this argument will not bear another ounce, and that ounce has been added in this case. The evidence set out in the bill of exceptions does not state a search in all the courts held by the judges of the Circuit Court, and does not show a loss of all records in which the fact now in question may have been recorded. Counsel in this case will understand the meaning and propriety of our observation, when we suggest that a search of the records of the District Court of the United States for this District should appear to have been made before the clerk's statement that he did not *find* any record of naturalization proceedings between the years 1835 and 1841 should be considered ground for receiving parol evidence of Downs' naturalization. The court was right, therefore, in excluding testimony to show that John Downs voted at elections in Washington without being challenged at the polls.

By the sixth bill of exceptions it appears that at the close of all the evidence in the case, the defendant asked the court to give the following instructions to the jury, and that they were refused:

"First. If the jury find from the evidence that John and William Downs purchased the property in controversy from the Bank of Washington in 1844, and took the conveyance, the record of which has been read in evidence here, the entire estate devolved on William on the death of John, and the plaintiffs are not entitled to recover in this action, and your verdict should be for the defendant.

"Second. Unless the jury believe from the evidence that the parents and grandparents of the plaintiffs were lawfully married, they must find for the defendant.

“And the court instructs the jury that proof of such marriage can only be made in this form of action by the record, or a certified copy thereof, or the testimony of a witness or witnesses who were present at the ceremony, or by the declarations of deceased persons who are related by blood or marriage to such parents.”

We have already held that, after and by effect of the deed from the trustees to John and William Downs, they held as tenants in common, and the effect of this decision is that John Downs' interest would go to his heirs and not by supervision to William Downs. The first of these prayers was, therefore, properly refused.

As to the second, the effect of our decision relating to the second and third bills of exceptions is that, according to the rule laid down by this court in *Green vs. Norment*, the marriage of parents and grandparents may be shown, in making out the pedigree of the plaintiffs, by proof of facts from which such marriages may be inferred, and that the plaintiff, claiming as heir, is not confined to the method of proof described in the second prayer.

The last of the exceptions is taken to the court's refusal to grant a new trial. With the views which we have expressed as to the several rulings during the trial, we are, of course, of the opinion that a new trial was properly refused.

The judgment of the Circuit Court is therefore affirmed.

THE UNITED STATES

vs.

ANNIE A. COLE ET AL.

1. There is no limitation to the character and extent of the building regulations which the District Commissioners are authorized to make and enforce under the Act of Congress of June 14, 1878. The terms of that act are broad enough to include every form of building regulations that the Commissioners may deem advisable, and which may reasonably be considered as a proper subject of regulation. See U. S. *ex rel.* Strasburger *vs.* The Commissioners, 5 Mackey, 389.
2. And although the authority to subject to private and individual use lands belonging to the United States is a substantive power, and, therefore, is not included as an incident, in even the most unrestricted power to make regulations about buildings on individual holdings, yet it must be assumed, in construing the Act of 1878, that Congress, in granting to the Commissioners power to make building regulations, had in mind, and acted with reference to, what had already been done under the name of making building regulations, and as the previous building regulations of the city of Washington authorized the occupation of the streets by permanent projections, it cannot be doubted that the authority vested in the Commissioners by the Act of 1878 carried with it power to provide for such occupation of the streets.
3. The building regulations, which the Commissioners were authorized to make by the Act of 1878, have the same effect until regularly altered by the Commissioners as if they had been enacted by Congress.
4. These building regulations authorize projections from the building line of a street or avenue in front of a private holding, thus making the building line the basis and condition of the privilege, but there is no authority to make projections from something which cannot be considered a building line, thus: The apex formed by the meeting of the building lines of M street and Massachusetts avenue, northwest, is not in any sense a building line and these regulations, therefore, do not authorize any projection from and in front of that apex.
5. The power given the Commissioners by the Act of 1878 to make rules regulating projections from the building line was a power to make general rules governing all persons alike and not to empower them to decide each case independently and without rule; where, therefore, the building regulations provide that projections from the building line shall not exceed 14 feet in width, a further provision that such width may be exceeded when approved by the Engineer Commissioner is unauthorized and inoperative.

6. An unauthorized encroachment, by private persons, upon the streets of the city of Washington is a purpresture which the United States, having the legal title to the streets for the public benefit, may, by proceedings in equity, secure a mandatory injunction to prevent and remove.

In Equity. No. 11,457. Decided December 23, 1889.

The CHIEF JUSTICE and Justices JAMES and MONTGOMERY sitting.

BILL in equity by the United States to enjoin an alleged illegal encroachment of a private building upon public land.

THE FACTS are stated in the opinion.

Messrs. JOHN BLAIR HOGE and RANDOLPH COYLE for the United States :

1. The suit is properly brought in the name of the United States by John Blair Hoge, their attorney in and for the District of Columbia.

The duty imposed upon the chief of engineers by section 226, R. S. D. C., the power conferred upon that officer by the next following section, or the direction to the Secretary of the Interior embodied in section 1818, R. S. U. S., all relating to the keeping of the streets of Washington free from obstructions, do not operate to the exclusion of the right of the United States to bring an action in their own name without the intervention of any relator, and by their appropriate instrumentality, for the protection of an invaded right.

By section 904, R. S. D. C., the United States Attorney for this District is required to "perform all the duties required of district attorneys of the United States."

Section 771, R. S. U. S., provides that "It shall be the duty of every district attorney to prosecute in his district * * * all civil actions in which the United States are concerned."

Section 362, R. S. U. S., provides that "The Attorney-General shall exercise general superintendence and direction over the attorneys * * * of all the districts of the United States."

The presumption, which has not been rebutted, is that

this action was brought by the District Attorney under the superintendence and direction of the Attorney-General.

2. The action is in proper form.

"A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General in England, and at the suit of the State, or the people or municipality, or some proper officer representing the Commonwealth in this country." Pomeroy's Eq. Jurisp., Sec. 1349, citing Atty. Gen. *vs.* Cleaver, 1 Ves., 211.

Quo warranto would not lie, as has been suggested, against the Commissioners for abuse of a franchise in sanctioning and approving the permit to build. High on Extraordinary Legal Remedies, Sec. 618, citing People *vs.* Whitcomb, 55 Ill., 172.

3. The parties defendant are properly joined. They are all active participants in the wrong sought to be corrected, and affirmative relief is asked as to each.

4. The fee in the streets of Washington is in the United States. Van Ness *vs.* City of Washington, 4 Peters, 232; Steamboat Co. *vs.* Steamboat Co., 109 U. S., 680-694. District of Columbia *vs.* Washn. Market Co., 3 MacArthur, 573.

An easement is defined to be "A service or convenience which one neighbor has of another by charter or prescription without profit." Post *vs.* Pearsall, 22 Wend., 438.

"The right one man has to use the land of another for a specific purpose." Jackson *vs.* Trullinger, 9 Oregon, 397.

"A liberty, privilege or advantage in land, without profit, distinct from an ownership in the soil." Jamaica Pond Aqueduct Corporation *vs.* Chandler, 9 Allen, 165.

It will not do to say that, because the encroachment is upon that part of the street set aside for parking, and not used as a thoroughfare, it cannot constitute a nuisance. There are other rights incident to the use of a highway besides that of passing over or along every part of its surface, such as the rights of unobstructed light or air or view. See Reimer's Appeal, 100 Pa., 188.

Besides, the act of Congress authorizing the parking of the streets, now embraced in Sec. 225, R. S. D. C., expressly forbids their use for any private purpose whatsoever.

5. Any unreasonable obstruction of a highway is a public nuisance. Wood on Nuisances, Sec. 250 *et seq.*; Story's Eq. Jur., Sec. 921 *et seq.*; People *vs.* Cunningham, 1 Denio, 524; Harlow *vs.* State, 1 Iowa, 437; Wetmore *vs.* Tracy, 14 Wend., 250; Rex *vs.* Russell, 6 East, 427.

6. Statutes legalizing what would otherwise be nuisances are to be strictly construed. Dillon on Municipal Corporations, Sec. 519; Story's Eq. Jur., Secs. 302, 303; Hughes *vs.* Railroad Co., 2 R. I., 493; Stromfeltz *vs.* Turnpike Co., 13 Pa. St., 555; State *vs.* Mobile, 5 Porter, 279.

Municipal authorities cannot give a valid permission to erect permanent structures encroaching upon public streets without express authority to this end be conferred upon them by charter or statute; Dillon on Municipal Corporations, Sec. 521; Flemingsburg *vs.* Wilson, 1 Bush., 203; Atty. Gen. *vs.* Heishorn, 18 N. J., Eq. 410; Com. *vs.* Rush., 14 Pa. St., 186; Wartman *vs.* Philadelphia, 33 *Id.*, 202-10; State *vs.* Mobile, 5 Porter, 279.

7. "This power to make rules and regulations which shall confer a general or common right in which all shall equally participate, does not authorize the granting to one and the withholding from another a permission to construct jut or bay-windows according to the caprice or will of councils.

* * * If each case is to be individually passed upon, and does not depend upon its conformity to a general rule, this would be the result not only in regard to bay-windows, but for every other purpose for which it would be desirable to occupy the highway. This is characterized as special legislation on subjects of general interest and concern, forming no rule or regulation for all alike, but giving invidious privileges to the favored few at the expense of the many, which is contrary to the whole spirit and intent of

the authority intrusted to the councils by this law." Reimer's Appeal, 100 Pa. St., 182-185.

Messrs. WILLIAM BIRNEY and MARTIN F. MORRIS appeared for the defendant, Cole, and Mr. A. G. RIDDLE for defendants, the Commissioners of the District of Columbia and the Inspector of Buildings but filed no briefs.

Mr. Justice JAMES delivered the opinion of the Court :

The United States brings this suit as owner of the streets of Washington. The bill alleges that the defendant Cole, a married woman, claims to own in her own right, and is in possession of lot 1 in the subdivision by the heirs of John Davidson, of square 213, fronting 126.38 feet on M street north, 115.50 feet on Massachusetts avenue, having a westerly boundary line of 51.30 feet, and running to a point at its eastern end, as shown by an exhibit filed therewith ; that a part of said holding has for many years been improved by a brick dwelling, while the eastern part—that is to say, the part running to a point—fronting 55.68 feet on M street, and 52.8 feet on Massachusetts avenue, has been vacant ; that on September 17, 1888, the owner commenced building foundation walls for a brick structure on the vacant part of said lot, placing them partly coincident with and partly exterior to the outer lines thereof, as shown by the exhibit referred to ; that at the time of the filing of this bill (October 10, 1889), she had built up the said walls to a height of 10 feet above the ground, and purposed carrying them to the height of three full stories and a basement, and that, so far as these walls lie outside of the lines of her holding, they are entirely on complainant's land.

It is further alleged that the defendant Cole is acting in the premises under the pretended authority of a so-called permit, issued by the defendant, Entwistle, as " Inspector of Buildings," with the consent, authority and approval of the District Commissioners, and that, although the building in course of erection is designated in the permit as an addition to the building standing on the other part of the lot, it

is designed and intended to be used as a separate and independent dwelling house. It is charged that the permit is insufficient in law to authorize the erection of said building, and is void so far as it pretends to authorize the erection of walls exterior to the lines of the defendant Cole's individual holding; that the erection contemplated would involve an invasion of complainant's property, and would constitute a public nuisance. The prayer is that she be enjoined from further proceeding with the erection of the building, and required to remove such parts already erected as lie outside of the building line.

The answer of defendant Cole sets up that no part of the structure complained of is upon that part of the street or avenue named which is used for public travel, but that the whole of it is only upon her own lot and the contiguous parking; denies that it is upon any part of the street used by the public, or that it will obstruct travel or offend good taste, and claims that it will be an architectural ornament rather than a public nuisance.

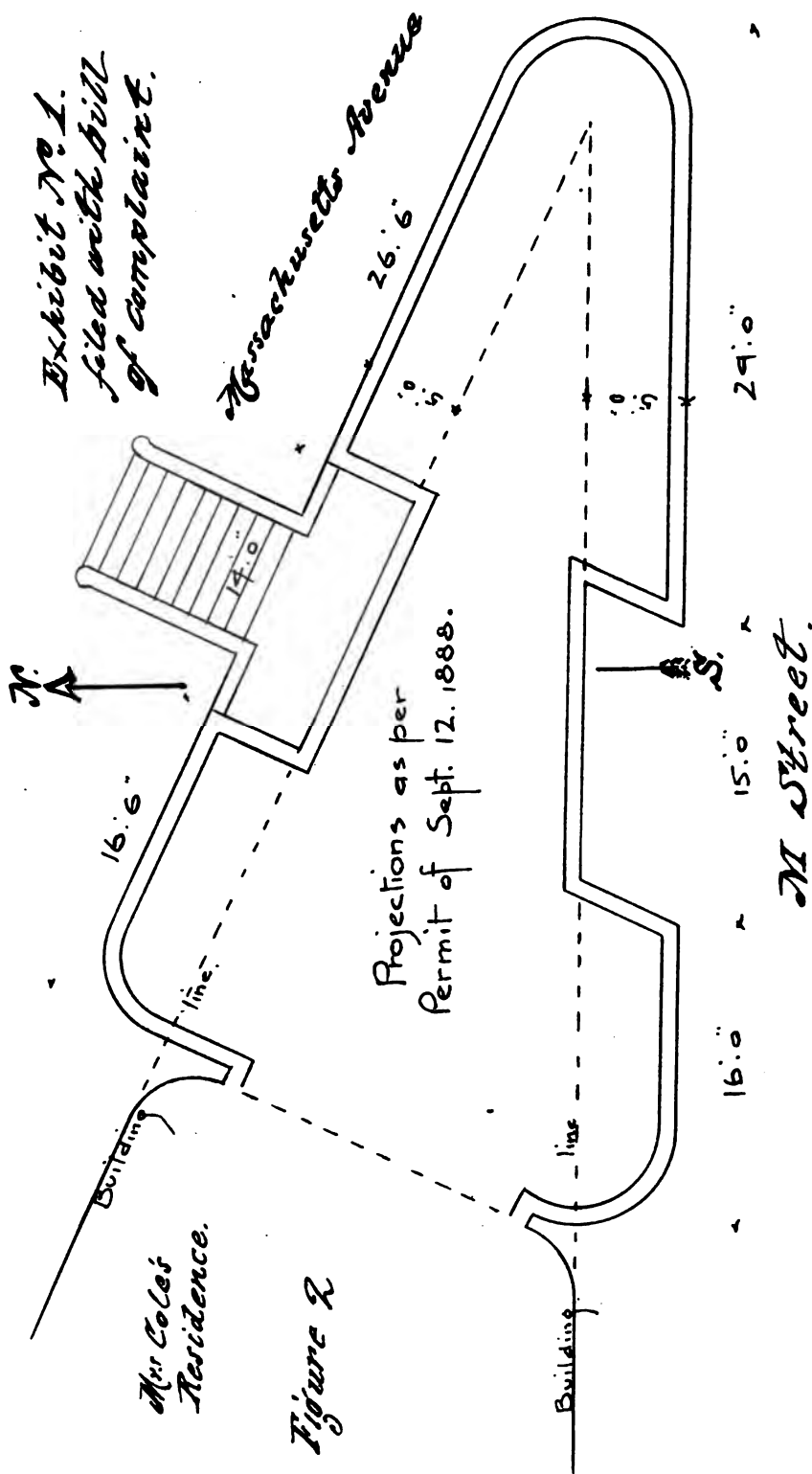
The joint and several answers of the Commissioners of the District and the Inspector of Buildings set out the history of the authority to make building regulations, and state that in pursuance of the authority given by the Act of Congress of February 21, 1871, the Board of Public Works, with the approval of the legislative assembly, adopted a general plan for the improvement of the streets and avenues, and, as a part of said plan, caused a space 18 feet wide to be parked next adjoining the building line on M street, and a space 40 feet wide to be parked on Massachusetts avenue next adjoining the building line, adjacent to defendant Cole's property, and encircling the eastern apex thereof; that this parking has ever since remained, and is inclosed by a suitable fence; that outside of it there is a foot-way 12 feet wide on M street, and 15 feet wide on Massachusetts avenue, and that M street is 90 feet, and Massachusetts avenue 160 feet wide where said Cole's property borders thereon.

The answer further sets out, by exhibit, the building regulations made by the Commissioners under authority of the Act of Congress of June 14, 1878. 20 Stats., 131.

It appears by the exhibits that Mrs. Cole's original application was for a "permit" to build "a three-story and basement brick *addition*, 24 feet by 46 feet, including a projection 5 feet by 44½ feet on Massachusetts avenue, and one on M street 5 feet by 48 feet," according to a plan submitted; but that afterwards a different plan was submitted to and approved by the Commissioners, and permit was issued accordingly, by which two projections on Massachusetts avenue, and two on M street—one on either side of an entrance from those streets respectively—were provided for. The projection on the west side of the entrance from Massachusetts avenue was to be 5 feet from the building line and 16½ feet wide; and that on the east side was to be of the same depth and 26½ feet wide. On M street the projection west of the entrance was to be 5 feet deep by 16 feet wide, and that on the east side was to be of the same depth and 29 feet wide. According to the exhibit of plan the projections on Massachusetts avenue and M street, east of the entrance referred to, touched the building line only at their western ends. From those points they extended eastward without returning to the building line, and encircled the apex of Mrs. Cole's lot; thus connecting the projection on Massachusetts avenue with that on M street. The actual foundations and walls referred to in the bill were constructed on that plan.

These facts raise the question whether the building of these projections into the parking is lawful, and the manner of considering it is fairly stated in two averments of the bill and answer. The bill alleges "that the permit is insufficient in law to authorize the erection of said building, and, so far as it pretends to authorize the erection of walls exterior to the lines of defendant Cole's individual holding, is null and void." The answer of the Commissioners

*Exhibit No. 1.
filed with bill
of complaint.*



UNITED STATES vs. COLE ET AL.
Plan of alleged illegal projection as referred to in the opinion
of the Court.

alleges: "That the building regulations are in law and equity a complete authority for the structure now building."

It is unnecessary for us to consider again the power of the Commissioners to make building regulations. As Mr. Justice Hagner said, speaking for the court in *United States ex rel. Strasburger vs. The Commissioners*, 5 Mackey, 389 (393), the Act of June 14, 1878, seems to have been designed to confer upon the Commissioners a power with respect to building regulations of the most comprehensive character. It authorizes and directs the Commissioners 'to make and enforce such building regulations for the said District as they may deem advisable;' and it declares that 'such rules and regulations made as above shall have the same force and effect within the District of Columbia as if enacted by Congress.' There is no limitation to the character and extent of the regulations thus authorized, but the terms are broad enough to include every form of building regulations that the Commissioners may deem advisable, and which may reasonably be considered as a proper subject of regulation."

But it is to be remembered that the streets and avenues of Washington are the property of the United States (*Van Ness vs. The Mayor, &c., of Washington*, 4 Peters, 232); and as it may be said that authority to subject to private and individual use lands belonging to the United States, is a substantive power, and, therefore, is not included, as an incident, in even the most unrestricted power to make regulations *about buildings* on individual holdings, it is necessary to consider whether this substantive power has also been granted, either expressly or by implication.

As a rule of construction it must be assumed that in granting to the Commissioners power to make building regulations, Congress has had in mind and acted with reference to what had already been done under the name of making building regulations, and we find that "building regulation No. 2," published by President Washington July 7, 1794,

authorized areas 7 feet in breadth in the streets immediately adjacent to buildings; that under the amendment to the charter of the city of Washington, passed May 15, 1820, authorizing the corporation "to regulate, with the approbation of the President of the United States, the manner of erecting and the materials to be used in the erection of houses," an ordinance was passed on the 30th of March, 1822, authorizing the construction by property owners of vaults under sidewalks, and of areas, steps, cellar doors and colonades, or open arches, all of them to project, within variable specified limits, beyond the building lines of private holdings, and, finally, we find that on the 16th of January, 1871, the city council of Washington authorized the projections specifically known as bay-windows. In view of such previous exercise of power to authorize, under the head of regulation of buildings, the occupation of streets by permanent projections, it cannot be doubted that the authority vested in the Commissioners in 1878 to make building regulations carried with it power to provide for the occupation of the streets by such permanent projections as bay-windows, notwithstanding such power over the property of the United States was substantive, and not incident to the power to make *regulations about buildings* erected on private holdings. We must, therefore, hold the building regulations existing when this permit was granted to have the same effect until regularly altered by the Commissioners, as if they had been enacted by Congress.

What building regulations, then, apply to the structure in question? We are referred by both parties to section 7 of the regulations, which contains the following provisions: "Projections from the building line of any street or avenue eighty feet or more in width shall not exceed the following distances: Areas eight feet on parked streets and six feet on unparked streets; show-windows three feet, *bay-windows* and *tower projections* five feet on parked streets and four feet on unparked streets; steps nine feet on unparked streets,

twelve feet on parked streets, unless otherwise determined by the Inspector of Buildings, when, in his opinion, the parking is of sufficient width. * * * No fire-place or chimney shall be constructed in any projection outside of the building line, unless the shaft return to the building line and be carried upon iron beams.

"*Bay windows and tower projections* shall not exceed fourteen feet in width, unless approved by the Engineer Commissioner; and on a building twenty feet or less in width, the building line front must be preserved by not less than three feet six inches. On buildings fifteen feet and less in width, by not less than two feet six inches; on buildings over twenty feet and under thirty-five feet front, by not less than four feet ten inches; spaced as approved by the Inspector of Buildings. But one projection will be allowed on a building thirty-five feet and less in width. On larger fronts the projections shall not *aggregate* more than fifty per centum of the frontage of a principal or entrance front, and forty per centum of a side front, exclusive of *corner tower projections*."

We were also referred at the argument to section 1 of the regulations, for the following definitions, as showing the meaning of the foregoing provisions:

"*Building Line*.—The line of demarcation between the public and private space."

"*Bay-Window*.—A first floor projection for a window, other than a tower projection, or show-window."

"*Oriel Window*.—A projection for a window above the first floor."

"*Tower Projection*.—A projection designed for an ornamental door entrance, for ornamental windows, or for buttresses."

It was assumed on both sides at the argument that the projections in question, whether they conformed to the regulations or not, must belong to the categories of either bay-windows or tower projections; and we do not find anywhere

in the building regulations any other class of projections to which they could belong. The question then, is, whether they conform to the regulations concerning these particular subjects. In determining this question, it is proper to interpret, in the first place, the meaning of the definitions referred to. We think that when they define a bay-window to be a "*first floor projection*," and an oriel window to be "a projection for a window *above the first floor*," it must be understood that a bay-window does not include and perform the office of an oriel window; in other words, that a bay-window is strictly a projection one story high. The definition of tower projection, on the other hand, does not speak of the stories from which it may project; but the word "tower," and the fact that the definition prescribes no limitation, indicate that such a projection, beginning at the foundation, includes several stories. When this bill was filed the walls had been built only about 10 feet high, and did not include the whole of even the first story; but the permit was for projections which should include a basement and three stories. It purported, therefore, to authorize the construction of tower projections. This distinction is only important for the sake of clearness, inasmuch as the rule of projection and width is not varied by it. The rule as to those dimensions applies to bay-windows and tower projections alike.

We proceed, then, with tower projections. We find that the regulations describe *all* projections, of whatever kind, as "projections from the building line of a street or avenue." In other words, they authorize projections where there is such a building line, and do not authorize projections from something which cannot be considered a building line, thus making the building line the basis and condition of the privilege. In this case, for example, they authorize projections from the building line of Massachusetts avenue, and the building line of M street; but the apex of Mrs. Cole's lot, where these building lines are interrupted, is not itself,

in any sense, a building line, and these regulations do not authorize any projection from and in front of that apex. It is clear, we think, that what Congress intended to empower the Commissioners to license, and what, accordingly, the regulations propose to license, is the enjoyment, by a private holder, of certain privileges *in front* of his holding. Whether there was any reason of public interest for not extending these privileges into the space beyond the point at which the building lines terminated in an apex we need not decide; we simply hold that when all projections must be *from a building line*, this apex cannot be treated as if it were a third building line, and made the basis or point for a projection toward Thomas Circle.

On referring to the exhibit showing the plan submitted to and approved by the Commissioners, we find an apparent attempt to meet the objection that this apex was not itself a base for a projection. The figures and red lines indicating the length of the projections on Massachusetts avenue and M street, respectively, evidently include the projection beyond the apex as a part of those projections, showing the former to be 26 feet, 6 inches, and the latter to be 29 feet. And on referring to the application for a permit to build, we find that it describes the proposed projections as "two projections on Massachusetts avenue 16 feet 6 inches, and 26 feet 6 inches wide, and two on M street, 16 and 29 feet wide," showing conclusively that the plan includes the projection beyond and east of the apex as a part of the projections on the streets. It is hardly necessary to say that, as projections on those streets, such extensions 5 feet beyond the point at which the Massachusetts avenue and M street fronts of Mrs. Cole's lot terminate, are not authorized by the regulations.

It may be added that we learn from a plat showing the projections from buildings on other similar points around the same circle—which, if not made an exhibit, was drawn in the office of the District Engineer, and was agreed by

both parties at the argument to be correct—that the construction of the regulations which we have just announced must have been adopted by the Commissioners in former cases. What appear to be corner-towers of Mrs. Dahlgren's house, at the opposite and corresponding apex, formed by the intersection of the building lines of Massachusetts avenue and M street, and of the Portland flats, at the intersection of the building lines of Vermont avenue and Fourteenth street, are projections from the building lines of these avenues and streets, respectively, and do not encircle or extend beyond these apexes.

It is true that the structures referred to were erected under the regulations of 1882, but those regulations no more permitted this extension beyond the apex than the present rules do. We are, therefore, of opinion that in any respect a projection beyond the apex of Mrs. Cole's lot is unauthorized by the building regulations.

We observe, in the next place, that the projections on Massachusetts avenue are (if we omit the projection of 5 feet beyond the apex) 16 feet 6 inches and 21 feet 6 inches, and on M street 16 feet 6 inches and 24 feet. It is claimed by the defendants that a permit for projections having such widths was authorized by the following clause of the regulations: "Bay-windows and tower projections shall not exceed 14 feet in width, *unless approved by the Engineer Commissioner.*"

Substantially, this is a provision that the Engineer Commissioner may, in each case and independently of all others, authorize any dimension over 14 feet that he may think fit. It seems to have been imagined by the Commissioners that by making a rule that the Engineer Commissioner might act at his discretion in this matter; in other words, without rule, they had satisfied the requirement of the statute that they should make rules about the same matter. To call this a rule about bay-windows and tower projections is an abuse of words. It is merely a rule about the powers of

the Engineer Commissioner, and as such it is illegal and inoperative. It would have been equally so had the same power been reserved to the Commissioners themselves; in other words, to the very persons who were charged with the making of rules and regulations. The power given to them by Congress was power to make *rules*, not power to provide that they would decide each case independently and without rule. There may be matters as to which it is competent for the Commissioners to reserve or to delegate to others discretionary powers; but this is not one of them. From the time of President Washington's regulations down to the time when this power was vested in the District Commissioners, the appropriation of the public spaces for any kind of projections from private holdings has always been the subject of fixed and general rules; and it is a necessary conclusion that Congress intended that it should stand on that footing.

As we have already suggested, this is not in its nature an incident, but a substantive power. It must be used in the very manner indicated—that is to say, by making general rules.

A case relating to this point was well considered and decided by the Supreme Court of Pennsylvania, in Reimer's Appeal, 100 Pa. St., 182. An act of the Pennsylvania Legislature had empowered the city councils of Philadelphia "to make and establish rules and regulations for the better regulation of jut or bay-windows." The councils, without establishing any general or fixed rules, undertook, by ordinance, to grant a special permit to one Reimer to construct such a window, projecting at a point many feet above the sidewalk, from the front of his private dwelling. The Commonwealth, by its attorney-general, filed an information in the nature of a bill in equity to restrain the defendant, Reimer, from maintaining the obstruction, which was alleged to constitute a nuisance. In an opinion adopted with the strongest commendation by the Supreme Court of

the State, the presiding judge of the Court of Common Pleas of Philadelphia County thus disposed of the ordinance which was set up as a defense:

"The power to make rules and regulations which shall confer a general and common right in which all shall equally participate, does not authorize the granting to one and the withholding from another a permission to construct jut or bay-windows according to the caprice or will of councils. * * * If each case is to be individually acted upon and does not depend upon its conformity to a general rule this would be the result not only in regard to bay-windows, but for every other purpose for which it would be desirable to occupy the highway. This is characterized as special legislation on subjects of general interest and concern, forming no rule or regulation for all alike, but giving invidious privileges to the favored few at the expense of the many, which is contrary to the whole spirit and intent of the authority entrusted to the councils by this law."

The principle of this case rests upon the broadest considerations, and if it was important to restrict by it the action of a representative and legislative body, it would seem still more important that it should be applied to the exercise of powers by officers who are neither of these.

Since, then, this pretended grant of discretionary power to the Engineer Commissioner is unauthorized and inoperative, and since the Commissioners themselves can only provide by general rules for the width of bay-windows and tower projections, it follows that any width greater than the 14 feet authorized by the general rule is unlawful.

There remains to be noticed another effect of the regulations. It is manifest that they require that bay-windows and tower projections shall be so constructed that both of their side walls shall touch and project from the building line; in other words, that such a structure must not only start from the building line on one of its sides, but return to it on the other. This much is indicated by the very phrase "pro-

jections from the building line." Moreover, it is provided, in respect of buildings less than 35 feet wide, that, in making these projections, a certain amount of "building line must be preserved, * * * spaced as approved by the Inspector of Buildings." This means that a part of the front of a building having a bay-window or tower projection shall consist of a wall standing on the building line, and that determines that the projection must, on both of its sides, project from that line. Now, although this provision is predicated of buildings less than 35 feet wide, and is not repeated in the next clause relating to wider buildings—which only provides that the aggregate of the several projections may amount to a certain percentage of the front of the building—it cannot be supposed that the general rule ceases in such cases to be applicable to each projection. The rule must require, then, that in this case also the *two* projecting walls must start from the building line from which the structure projects. Now, it was precisely a disregard of this requirement that made possible the sort of structure permitted in this case. The projecting wall of the alleged tower projection starts from the building line of Massachusetts avenue at the east side of the door entrance, and never returns to any building line until it has gone around the apex of the lot and returned to the building line of M street at the east side of the door entrance on the latter street. This so-called "projection" is not, in the sense of the regulations, a bay-window projection or a tower projection from either Massachusetts avenue or M street. It simply has the effect of a wall enclosing the defendant's lot at some distance from the building line of either street. To the eye such a plan of construction suggests a large house built around a smaller holding; not such projections from that holding as Congress intended the Commissioners to authorize, nor such as their regulations actually permit. We think that this structure violates both the letter and spirit of the building regulations.

The law has been most liberal in its concessions to the owners of private property in Washington, and especially to the owners of property abutting on the parked avenues and streets. They have been permitted to adorn and enjoy the public spaces in front of their houses as if these were their private gardens. But the private holder has been reminded by the same law that even the very concessions which he enjoys are not made solely for his individual benefit, but also for the common welfare and enjoyment. In the language of the Commissioners' answer, it was as part of "a general plan for *the improvement of the streets and avenues*" that these parks were laid out, and they are still to be regarded as simply the adorned portions of the streets. In contemplation of law and of this street scheme, the common interest in their preservation is just as positive as it is in the preservation of the roadways. When they were withdrawn by law from public travel, they were not wholly withdrawn from public enjoyment. Their public uses are wholly different, but in the eye of the law they are equally substantial. Beauty of surroundings and the gratification of taste may be provided for public use and benefit, just as comfort and safety of travel are so provided; and this interest of the public has been distinctly considered and recognized in the establishment of these parks, and in the provisions for their adornment, and for their maintenance and preservation. It is therefore not a matter of easy-tempered indifference that these spaces should be narrowed by unlawful structures, even to a small extent, nor even if such structures may offer the apology of being ornamental. If there is a remedy by which it can be done it is especially important that the beginnings of such wrongs should be stopped before they become common and more serious by toleration. We have to consider, then, whether the proper remedy has been sought in this case.

It was suggested at the argument, on the part of the de-

fendants, that there is nothing peculiar in the ownership of the streets of Washington by the United States which should determine the nature of the remedy, since it had been decided in the case of *Van Ness vs. The Mayor, &c.*, of Washington, 4 Peters, 232, that the United States might sell them. But we do not so understand the effect of that case. Throughout the opinion of Mr. Justice Story, speaking for the court, it was plainly recognized that the streets there in question were held by the United States in its political character. The true purport of that decision is well expressed in the syllabus prefixed by Mr. Curtis: "The streets and public squares of the city of Washington, having been conveyed by the proprietors of the lands to trustees 'for the use of the United States,' held: That the United States owned the lands in fee simple, and, in connection with certain public improvements, might sell portions of the same which were no longer useful as streets, and make title thereto." It is plain that nothing in this case places the United States on the footing of an ordinary property owner in respect of the question before us. These streets are held by the United States as property, but in its capacity of a political body, and an encroachment upon such property is encroachment upon the sovereign, and is what is called *purpresture*.

Jurisdiction of cases of this kind seems to have been exercised chiefly by the equity side of the exchequer, "which had," as Chancellor Kent observed, in *Attorney-General vs. Utica Ins. Co.*, 2 Johns. Ch., 382, "an appropriate jurisdiction, touching the property of the crown." It is a recognized part of the jurisdiction, however, of the courts of equity. Story says: "The jurisdiction is applicable not only to public nuisances, strictly so called, but also to *purprestures* upon public rights and property. *Purpresture*, according to Lord Coke, signifies a close or enclosure—that is, when one encroaches, or makes that several to himself which ought to be common to many. The term was, in the old law

writers, applied to cases of encroachment, not only upon the king, but upon subjects. But in its common acceptation it is now understood to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays and other public accommodations." 2 Eq. Jur., Sec. 921. In this country the jurisdiction applies to encroachments upon the State.

Early in this century the courts of equity still spoke of the rare use of their jurisdiction of cases of nuisance. *Attorney-General vs. Utica Insurance Co.*, 2 Johns. Ch., 332; *Attorney-General vs. Cleaver*, 8 Ves., 217, 218. In the first of these cases Chancellor Kent remarked that, in cases of public nuisance, in the only cases in which it had been exercised; that is, in cases of encroachment on the king's soil, it had lain dormant for a century and a half, from Charles I down to the year 1795. Nevertheless it is now firmly established, upon the principle that equity can give more adequate and complete relief than can be obtained at law. *City of Georgetown vs. The Alexandria Canal Co.*, 12 Peters, 98. The only case of purpresture decided by the courts of the United States to which we can refer is the *United States vs. Brighton Rancho Co.*, 26 Fed. Rep., 218; *Id.*, 25 *Id.*, 465; This case came up first on exceptions to the answer before Brewer, circuit judge, and Dundy, district judge, at the May term, 1885, of the Circuit Court of the District of Nebraska. Judge Brewer said: "The defendant has built a fence, partly on his own land and partly on land belonging to the Government, including a tract of several thousand acres. This is an action in equity to compel, by mandatory injunction, the defendant to remove its fence from the Government land, and thus leave the enclosed Government land free from all obstruction to approach. Of course the Government title is conceded, and its right to proceed by an action of ejectment to remove the defendant from occupancy

of any of its land is unquestioned. The question made is whether the Government can come into a court of equity and avail itself of the summary remedy given by such a court. We are of opinion that it can, and, whether the act of the defendant comes within the technical definition of purpresture or that of a public nuisance, we are of the opinion that the Government can come into a court of equity, and by its orders have an end put to this trespass on the public right. We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the Government. Generally speaking any encroachment upon the public domain may be restrained or ended by injunction, and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence was built, but also to separate the enclosed lands from the general body of the public domain."

This last observation indicates that the purpresture was also a nuisance; and it will be observed that, in the case at bar, the encroachment is not merely an entry upon the particular space occupied by the intruding structure, but operates to impair a system of street arrangement and improvement; thus adding to the purpresture, as in the case cited, another ground for equitable interference.

The same case came on for final hearing at the November term, 1885, before Mr. Justice Miller, sitting as circuit justice. As the report is brief we think it important to quote the whole case, since the statement of facts shows the firmness of the court's attitude on this question:

"This is a suit on behalf of the United States to obtain a mandatory injunction against the Brighton Rancho Company to compel it to remove a barbed wire fence 57 miles long, inclosing 52,000 acres of the public lands of the United States. The testimony disclosed that this fence stood partly on deeded lands, school lands, and lands

entered under the homestead, pre-emption, and timber culture laws of the United States. The testimony further disclosed that the fence was erected on these entered lands with the permission of the settlers. Inside the fence were a large number of acres of vacant public lands."

Continuing he said: "I am of opinion that the United States is entitled to its injunction, mandatory as to so much of the fence complained of as exists, and prohibitory as to building any future fences, so far as either of them comes within the following principles: (1) There exists no right in the defendants to build any fence on the lands of the United States. (2) All lands are, for this purpose, lands of the United States so long as the *legal title* remains in the United States. (3) It is the right of the United States and its duty to protect all such lands from this misuse in cases where there have been any kind of entries, whether of pre-emption, homestead, or private entry, though the purchase money be paid, so long as the legal title remains in the United States; except where these latter parties build their own fences, or give express license to others to do it. In these cases it holds the title in trust, and can maintain this bill to remove the fence or prevent its erection. A decree should be entered based on these principles."

In this case the jurisdiction of equity to put an end to encroachment on the sovereign's soil was applied where the sovereign held the legal title only in trust, and where the whole equitable interest was in private persons, on the ground that an interest and duty to protect the legal title from encroachment still remained in the sovereign; both having become, indeed, only the more serious by virtue of the trust. On this principle, whenever the Government holds the soil for any kind of public benefit, this duty to protect it from encroachment must exist, and the courts of equity must have jurisdiction to aid in its performance. Indeed, the highest and the true ground of the right of

equity courts in this country to apply their summary remedies in cases of purpresture is that the Government is not to be interrupted in its functions and duties, and is, therefore, peculiarly entitled to remedies which shall prevent or directly put an end to encroachments which tend to such interruption.

And if there is any case to which such considerations especially apply it is to encroachments upon the streets and squares of the city of Washington; and that for the reason that this city was established under the Constitution for the seat of Government. Because of its origin and purposes, the Government owes to the nation a peculiar duty to preserve and adorn it. It is not for its residents alone that its streets are bordered with parks, and its squares are decorated. It has at last become in fact what it was designed to be—the nation's city. Sixty years ago its status and destiny were defined by the Supreme Court in the very case which decided that the United States might sell such of its streets and squares as should be found useless. In demonstrating that the original proprietors must have understood the full effect of their conveyance, the court said: "They might well, and indeed must, have placed a just confidence in the Government; that, in founding the city, it would do no act which would obstruct the prosperity, or interfere with its great fundamental objects and interests. It could never be supposed that Congress would seek to destroy what its own legislation had created and fostered into being. On the other hand, it must have been as obvious that as Congress must forever have an interest to protect and aid the city it would for this very purpose be most impolitic and inconvenient to lay any obstructions to the free exercise of its power over it. The city was designed to last in perpetuity, *Capitoli immobile saxum*." *Van Ness vs. City of Washington*, 4 Peters, 232.

Surely a court of equity can have no more appropriate office than the protection of a plan devised in such a spirit

against the enroachments of individuals. The particular effect of a single instance of intrusion may not be serious, but toleration of a single instance is an invitation for another, and an ornamental intrusion is no more to be tolerated than one that is hideous.

When this bill was filed the structure complained of had only been begun; but, with knowledge that this court was charged with the determination of its character, and that its judgment might be adverse, it has, as we learned at the argument, been carried towards completion. The comment of the Supreme Court upon a similar course pursued by the defendant in the *Wheeling Bridge Case*, 13 How., 578, is applicable in all such cases. "The bridge company," said the court, "had legal notice of the institution of the suit, and of the application for an injunction to stay their proceedings before their cables were thrown across the river. This should have induced them to suspend, for a time, their great work, alike creditable to the enterprise of their citizens, and the genius and science of the engineer who planned the bridge and superintended its construction. It is a matter of regret that, by the prosecution and completion of the bridge, they have incurred a high responsibility."

The course pursued by the court in that great case is a precedent which we cannot disregard, when we reach the conclusions which we have commenced. The bridge was nearly a thousand feet between the abutments, and was completed at immense cost. Yet the court, having decided that, at its existing height, it interfered with the navigation of the Ohio River, did not hesitate to say that, unless it should be raised to a certain height, the bridge must be abated.

Holding the opinion which we have expressed, we can arrive at but one result. So far as this structure is an unauthorized intrusion on the public space it should be abated.

A decree will be drawn according to these principles.

CHARLES EDWIN HUNT

vs.

BENTON RUSS AND ANNIE RUSS.

1. A claim verified under the Maryland act of 1798 and passed by the Orphans' Court does not release the executor from the duty of defending against the claim if he knows of any defense, but if he knows of none he may safely pay it, and it will be allowed as a credit in his account against the personal estate.
2. But the order passing the claim is not even *prima facie* evidence of its validity as against the heir or devisee; so that if the executor pays the claim, and afterward seeks, because of overpayment, to be re-imbursed out of the realty, he must produce original evidence of the validity of the claim.

In Equity. No. 2,767. Decided February 4, 1890.
Justices HAGNER, JAMES and COX sitting.

BILL in equity brought in the name of an infant by his guardian for an account, and an appeal from a decree upon exceptions to a report of the auditor.

Mr. CHARLES H. ARMES for plaintiff.

Mr. W. K. DUHAMEL for defendants.

Mr. Justice COX delivered the opinion of the Court:

It appears that one August Vallbrecht, of the city of Washington, died in the year 1879, leaving a daughter named Annie Russ, wife of Benton Russ, and a grandson, who is the complainant, Charles Edwin Hunt, son of a deceased daughter, Louise Hunt. By his last will and testament he devised and bequeathed "unto my daughter, Annie Russ, all the money from the German Benevolent Society, for her own use and benefit forever."

Then, next, he devised "to my daughter, Annie Russ, and my grandchild, Edwin Hunt, the son of my deceased daughter, Louise Hunt, their heirs and assigns forever, the residue of all my real and personal estate, of whatever kind, to be equally divided, share and share alike; conditional,

however, that if my said grandson shall die without issue, his share to go to my said daughter, Annie Russ. And lastly, I do hereby constitute and appoint Benton Russ, to be executor of this, my last will and testament, with full power to sell and convey, and give proper deeds," &c.

It may be said, in passing, that although the will gives the grandson a fee, conditional upon his leaving issue, we consider that to be equivalent to a devise of an undivided interest absolute and in fee simple.

The executor, who is the son-in-law of the deceased, qualified and took possession of the personal property, but it was found to be very trifling, not exceeding the sum of \$34.50. The expenses of the funeral and administration amounted to \$122.19. Under the power given in the will to the executor to sell and convey and give proper deeds, he assumed that he had control over the real estate, and he collected a large amount of rents. He also made sale of one of the lots belonging to the deceased, which was subject to a deed of trust to the creditor; that is, sold the equity of redemption for \$380, and sold the other lot for \$1,000, receiving a cash payment of \$500 and a deferred note for \$500, the balance of the purchase money.

In September, 1885, the defendant, Benton Russ, filed a petition in the Orphans' Court, setting forth that the infant, Charles Edwin Hunt, was then entitled to the sum of \$500, which is one-half of the proceeds of said sale, and that he held a promissory note, secured by a deed of trust for the same, and asked that a guardian might be appointed for the child. It is alleged in the argument that he expected to be the guardian himself, because he had married the boy's aunt on his father's side, and gave notice that unless he was appointed guardian, he and his wife would insist upon their legal rights against the estate. However that may be, the boy's aunt was appointed guardian and has filed this bill in the name of the child, asking an accounting as to the personal estate, and the proceeds of the real

estate, against Benton Russ. Another subject of controversy, also, is certain money payable by certain German benevolent societies. The will gives the money to be derived from the German Benevolent Society for the use and benefit of Annie Russ, the married daughter. It turns out that there were two societies, one called the German Benevolent Society, the articles or constitution of which provided that each member should have the right to declare in his will how the money should go. There was no such provision in the constitution or articles of the other society, which was called the German Benevolent Society of the Evangelical United Church Congregation; but they paid the whole of the amount to the child, instead of giving any part of it to the grandchild, construing the German word in the constitution to limit the benefit to the child, the immediate descendant, and not to extend it to the grandchild. It makes very little difference, however.

We think it clear that this money did not belong to the estate, and therefore no relief can be given in this case against Mrs. Russ. If there is any claim against her it should be asserted at law in an action for money had and received, for one-half of the money collected by her.

The next important question in the case refers to the claims of Benton Russ, individually, against the estate of his father-in-law, and which he sets up in this action, by way of bar, or set off, against the claims of the grandchild against the fund. The answer makes two claims, one on a note of \$120, with interest, and the other for \$660, the amount for board and lodging, washing, &c., furnished to the deceased during his life-time.

In the course of the argument, it was suggested that the sale by the executor, under the power assumed by him to be contained in the will, of this real estate, converted the same into personalty, and therefore, it should be decreed that the money should go into the account of the executor as such.

This subject was discussed in the case of *In re Thompson*, 6 Mackey, 536; it was there shown that the doctrine of equitable conversion is purely a doctrine of a court of equity, in which it is held that when land is directed to be sold, it is converted into money for certain purposes; but it was never so treated for the purpose of being taken control of by an Orphan's Court or Court of Probate. That kind of court is not given any jurisdiction over the fund at all, and no action by it can affect the fund. The executor holds the money, not as an executor, but in trust, and any claim which is brought against it must be made out by the same kind of proof which would have to be adduced if the suit was brought directly for the purpose of affecting the land itself in the hands of the heir, and the money—the proceeds of the land—is as much the property of the devisees or the heirs at law as if the land had not been converted into money at all. This executor is in the attitude of a creditor prosecuting a suit against the heir at law on account of the deficiency of personal estate. He is to be dealt with here as if he had been a plaintiff filing his bill, instead of the executor, claiming a set-off for these claims.

The question is as to the kind of proof necessary to be produced to establish claims against the heir at law in such cases. A claim against the personal estate is to be verified under the Act of 1798; that is, by the affidavit of the party as to the justice of the claim, and then it is to be passed by the Orphan's Court by an order, but that order does not release the executor from the duty of defending against the claim, if he knows of any defense. If there is no objection to the claim known by the executor, he can safely pay it, and it will be allowed as a credit in his account of the personal estate. But an order passing a claim, in that form, is not even *prima facie* evidence of the validity of the claim as against the heir or devisee of the realty, and if the executor chooses to pay the claim and seeks, in case of overpayment, to be re-imbursed out of the real estate, he cannot

rely upon the order of the court passing the claim, but he must produce original evidence in support of the claim against the heir as a creditor would have to do. That was decided by the Court of Appeals of Maryland, and always has been recognized as the law here. In *Gist vs. Cockey*, 7 H. & J., 136, it was held that even a judgment obtained against an executor is no evidence against the heir at law, but the whole case must be proved anew. That has also been decided in this court. We decided it last, I think, in a case in 3 Mackey. In that case we cited the case of *Ingle vs. Jones*, 9 Wall., Supreme Ct. Rep., 495. The case in 3 Mackey, 236, *Keefe vs. Malone*, is a very strong case. There the executor was, at the same time, a devisee of the real estate, and we held that a judgment against him, binding the personal assets in his hands, was not even *prima facie* evidence against the same man in the character of devisee of the realty.

Now, in the light of the law, what did the auditor do in this case? He says, "This note is for the sum of \$120, payable to the said Benton Russ, on demand, with interest. It has and had when presented here, the usual affidavit of the creditor and the approval of the justice holding the special term of this court for Orphans' Court business, in the formula in which such approval is usually given.

"The next appropriation is made to an account presented by Benton Russ, marked Voucher 11½, being a claim of the testator for board, with room and washing, from August, 1875, to April, 1879, and amounting to \$660. To this claim there is, and was when presented here, attached the usual affidavit of the creditor and the approval of the justice holding the special term of this court for Orphans' Court business, in the usual form.

"Vigorous objection was made by the solicitor for the complainant to the allowance of these two claims last mentioned, mainly upon the ground that they are not accompanied by such approval as is required by law to authorize their allowance or payment."

Now, we hold that an executor proceeding against the heir at law must prove his case by the best evidence. Nobody ever heard that the production by him of an *ex-parte* affidavit made at another time was sufficient proof; that was not the best evidence. The auditor was clearly wrong. The note should have been proved by the usual proof introduced where such instruments are sought to be established, viz., proof of handwriting, etc.

Then, as to the other claim, the auditor says: "It is true that there is not in this proceeding any original proof competent and sufficient to warrant its allowance." We have examined the proof produced as to this item and find the same wholly unsatisfactory. It did not establish any sufficient contract on the part of the deceased; there is nothing but the statement of the creditor against the deceased, while the latter's mouth is closed, and he undertakes, in a very general way, to furnish this proof by his wife. The auditor further says, "But all objections urged here are disposed of in my opinion by the law existing in this District as found in the act of assembly of Maryland of 1798." He then refers to certain sections of the act as to the form of proof on which the executor is to pay claims against the deceased. He refers also to authorities, according to which an executor's claim is put upon the same footing as the claim of any other creditor. But he overlooks the fact that the authorities cited refer entirely to the administration of personal estate, and they simply hold that an executor who has paid a claim upon the ordinary voucher, upon an order of the Orphan's Court, will be fully protected in so doing and be entitled to credit on that account. That relates, as I said, exclusively to personal estate; but if he makes a claim against the deceased and has to resort to the real estate in order to satisfy it, he must establish his claim against the heir or devisee by the best evidence. The authorities cited have no application to a case like the present, where the whole assets of the testator are the proceeds of real estate

and the defendant Russ is a trustee, holding them for the benefit of these two parties, one his wife and the other a minor child. It is apparent, therefore, that the auditor erred in allowing this claim, and the case will have to go to the auditor again, to restate the account, when the alleged claims may be better proven. In the judge's decree at special term it is stated that, "the complainant having withdrawn his motion for leave to amend his bill and the complainant having relied in support of his exceptions to the several claims of the defendants allowed by the auditor upon lapse of time and upon the Statute of Limitations, it is ordered, adjudged, and decreed that the objection of laches and limitations be overruled."

Now, there is nothing in the record to show that the defense of limitations was ever made at all; there is nothing in the bill and there is nothing in the auditor's report about it. It appears to have been made, if at all, in the course of the argument. We have not before us anything to show whether the defense should be sustained, the only mention of it being in the decree of the court below. The decree below overruling the exceptions to the items of \$660 and \$120 is reversed. We sustain some of the exceptions to the auditor's report on both sides. We sustain the complainant's 3d, 4th, 5th, 7th, and the 14th exceptions, "The exception to the application of the proceeds of sale of the lot to Cavanaugh to pay the personal claims of Benton Russ," we do not now dispose of, that being a legal question which the court does not intend now to decide. As to the 15th exception which is as to the costs, we will postpone a decision until a final hearing of the case before us.

As to the exceptions of the defendant, we sustain the 4th and overrule all the others except the 2d, which we reserve for further consideration.

The decree of the court below will be reversed and the cause referred for a restatement of the account.

MICHAEL McCORMICK

vs.

THE DISTRICT OF COLUMBIA, THEODORE SHECK-
ELS AND JOHN F. COOK, COLLECTOR OF TAXES.

Where a certificate of indebtedness, which is afterwards judicially declared void, is issued against a lot for benefits accrued to it by reason of opening an alley, and this certificate is delivered by the municipality to another lot holder in satisfaction of damages awarded him in the condemnation proceedings, an assignment of it by the latter to a third party as security for an indebtedness amounts to an equitable assignment of the claim for damages, and entitles the assignee to enforce this claim against the city to the extent of the debt secured when default is made in the payment thereof.

In Equity. No. 9497. Decided February 4, 1890.
Justices HAGNER, COX and JAMES sitting.

BILL to annul a tax certificate. The case was heard on an appeal from the decree below.

THE FACTS are sufficiently stated in the opinion.

Mr. H. H. WELLS for plaintiff:

The complainant's case rests primarily on the doctrine that the removal of a cloud upon the title to real property is a well recognized and established ground for equitable relief, even where the cloud is caused by an illegal tax. *Holland vs. Challon*, 110 U. S., 15; *Union Pacific Railway Co. vs. Cheyenne*, 113 *Id.*, 516; *Chapman vs. Brewer*, 114 *Id.*, 158.

The rigid doctrine which has sometimes been applied, that the collection of taxes will not be restrained, does not apply to special assessments made by municipal authority, and it was so decided by this court in *Railroad and Bridge Co. vs. District of Columbia*, 1 Mackey, 217.

"We are of opinion," this court say, "that the general language used in the classes of cases referred to applies to taxes levied by the sovereign alone," and cites and quotes

with approval: High on Injunctions, 369; State Railway Cases, 2 Otto, 613; Webster *vs.* Connors, 51 Md., 395.

It is respectfully submitted that this lien certificate is a *cloud* upon the complainant's title.

It is not a valid lien, but it is a cloud. It ought not to be enforced. It has no validity as against the rights of the plaintiff, but it throws a cloud on his title.

The defendants may never undertake to sell, or if a sale is made, the purchaser may never bring ejectment, but in either event, the cloud remains the same. The complainant cannot sell his property without first paying, or in some way discharging, the illegal claim thus made thereon.

If it be urged that the *absence* from the record of the necessary facts required to show a compliance with the statute proves the proceedings to be void, we reply that the loss of the records and papers from the office only shows that they are not *now there*, but mislaid; and the presumption which the law indulges, that public officers properly discharge their public duties, tends still further to show that the record was once regular on its face.

Indeed, none of the illegalities complained of appear on the record, but the record, as far as shown, is free from objection.

The following are illustrations of some of the presumptions allowed in favor of the acts done by public officers:

"A public officer, a collector of taxes, is presumed to have duly *assessed* and collected the taxes." Hand *vs.* Columbia County Supervisors, 31 Hun., 531.

"The presumption that a public officer has done his duty applies to the assessor of taxes." Perkins *vs.* Nugent, 45 Mich., 156.

"The presumption is in favor of the authority of a city officer to do a particular act which he has done, when it appears within the general scope of the duties peculiar to his office." Kobs *vs.* Minneapolis, 22 Minn., 159.

To the same point: O'Hare *vs.* Blood, 27 La. Ann., 57.

The general rule on the subject is stated in *Best on Evidence*, Vol. 2, 630, Sec. 354. And see *Cooley on Taxation*, 543 and cases.

There are many cases, however, which ignore the distinction between proceedings void on their face for illegality, and proceedings which, though illegal in fact, are on their face presumptively valid. Such cases, if they do not give relief on the ground of illegality alone, will give it on the ground that any sale of the land under proceedings which assume to be by authority of law, and are conducted by public officers empowered to make such sales, is such a cloud upon the title of the owner as he ought in equity to be relieved against, if the officers are proceeding unlawfully and have no authority in fact." *Cooley on Taxation*, 544; *Blackwell on Tax Titles*, 483; *High on Injunction*, Sec. 539.

The plaintiff's property is not subject to the tax, "the certificate has no validity as against his right, and it throws a cloud upon his title," which ought to be removed.

Messrs. GEORGE C. HAZELTON and S. T. THOMAS for the District of Columbia:

The provision of law, that three persons should levy the tax, was a condition precedent to a valid assessment of benefits by the Commissioners. The mode of levying a tax as the basis of benefits in such cases by three persons excludes the idea that the city surveyor could levy the tax. Valid assessments for benefits cannot be made except in the mode prescribed by the ordinance. *Dillon on Mun. Corp.*, Sec. 618; *Welty on Assessments*, Sec. 10; *French vs. Edwards*, 13 Wall., 511.

In the case of *Newell vs. District of Columbia*, No. 27,964, at law (not reported), it was held by Chief Justice Bingham, in 1889, that an assessment for a street improvement made in January, 1872, by the surveyor of the District of Columbia and approved by the Governor was illegal.

The ordinance concerning alleys above referred to in force at the time of the passage of the Act of 1871, changing the

form of government of this District, was continued, among others, and was the law of the District on the subject in 1873, when Mr. Forsyth assumed to take the place of the "three disinterested citizens" provided for in the ordinance. R. S. D. C., Sec. 91.

Why the law should have been disregarded in this case is almost beyond comprehension; but Mr. Sheckels was a volunteer. He did not purchase the assessment certificate in question from the District of Columbia. He was not compelled to buy it. He took it, as he says, as collateral security from one McNamara. He took it, as we say, with his eyes open, and was therefore bound to know whether the law in regard to the condemnation of alleys out of which it grew had been complied with. Dill. on Mun. Corp., Sec. 851.

No money, as the proceeds of the sale of this certificate, ever went into the District treasury nor is the District estopped to make the defense of *ultra vires*. Dillon on Mun. Corp., Sec. 457, and cases cited; see, also, Secs. 539, 968, 969.

Moreover, the decree in this case was rendered in favor of Mr. Sheckels against his co-defendant, the District of Columbia, not upon a cross-bill against the complainant or the District as a defendant, claiming affirmative relief, but upon his answer. It has been settled for a long time, and is not now to be questioned, that one defendant in a suit in equity cannot have a decree against a co-defendant without a cross-bill with proper charges. *Barker vs. Belknap*, 39 Vt., 169; *Talbott vs. McGee*, 4 Monroe, 379; *Scott vs. Salor*, 3 C. E. Green (N. J.), 301; *Daniell's Chan. Prac.*, 1550.

It was not competent for the court below to enter a decree in favor of Sheckels against the District on his answer, even though he had shown himself entitled to relief, which is denied, and the decree, so far as it allows him to recover against the District, should be reversed.

Messrs. WILLIAM A. COOK and COLE & COLE for defendant Sheckels:

The District was and is indebted to Sheckels as the

representative of McNamara, in the amount of this certificate for damages to his property, ascertained by a proceeding instituted and prosecuted by it, and this certificate was taken as collateral to that indebtedness. If that certificate is void, it is so because of the negligence of the officers of the District in failing to conduct, according to law, the condemnation proceedings, and it is in accordance with the plainest principles of justice and equity that it should pay this debt. And it was in accordance with equity practice and proceedings for the court to decree over against the District in favor of Sheckels, as it did in the decree appealed from. 1 Daniell's Ch. Pr. (5th Am. ed.), 842, and note 3; 2 *Id.*, 1371, and note 6; *Corcoran vs. Canal Co.*, 94 U. S., 744; *Contee vs. Dawson*, 2 Bland., 292; *Hurt vs. Crane*, 36 Md., 31; *Carroll vs. Warring*, 3 G. & J., 500; *Chamley vs. Dunsany*, 2 Sch. & Lf., 709; *Semmes vs. Strong*, 1 Stew., 28 N. J. Eq., 131; *Vanderveer vs. Holcomb*, 2 E. C. Green, 17 *Id.*, 547.

Mr. Justice JAMES delivered the opinion of the Court:

In pursuance of a petition for the opening of an alley through square 762 of this city, and for that purpose, a portion of original lot 12, belonging at that time to one Hitz, was condemned and taken; his damages being found by the jury to be \$653.25. Afterwards William Forsyth, surveyor, undertook to assess the benefit tax upon the lots benefitted by the opening of the alley, and charged the remainder of Hitz's lot with \$108.98 as benefit. This, after absorbing Hitz's claim for damages, left his lot chargeable with \$415.73, benefit tax, for which a certificate of indebtedness was issued against his lot.

It appears that a portion of a lot belonging to one McNamara was also condemned and taken for the new alley; that his damages largely exceeded the benefits charged against him, and that the certificate of indebtedness issued against Hitz's lots—namely, for \$415.73—was given by the District to McNamara in part payment of the damages due him. McNamara, being indebted to the defendant Sheck-

els, transferred to the latter the certificate as collateral security.

Meantime, in July, 1873, the complainant had purchased a portion of Hitz's lot, without any knowledge of the proceedings to charge it with a lien for this alleged indebtedness and paying the full value without any deduction for such lien.

On McNamara's failure to pay his debt to Sheckels, the latter sought to enforce his collateral, and demanded, in accordance with the ordinary course in such cases, a sale of the premises in satisfaction of the alleged lien.

It appears that, in pursuance of certain proceedings which it has not been considered necessary to state here, a part of this alleged indebtedness had been paid by Hitz, and the sums thus paid turned over to Sheckels, leaving a balance of \$266.44 of said alleged indebtedness unpaid. It is for this balance that Sheckels demanded a sale.

We find that the proceedings for condemnation and the ascertainment of damages were regular, but that the subsequent proceedings for the assessment of benefits were not merely irregular, but wholly without authority. It follows that no benefit-tax has ever been assessed, and that the certificate of indebtedness delivered to McNamara in payment of his damages, and now held by the complainant, is inoperative and does not constitute a lien upon any part of the Hitz lot. The Equity Court was, therefore, right in enjoining a sale of the complainant's lot in satisfaction of this certificate lien. In that case Sheckels claims that he is entitled to recover from his co-defendant, the District, the amount of damages to McNamara remaining unpaid.

We are of opinion that the transfer of this certificate by McNamara necessarily imported an assignment of his claim for damages, in respect to which that certificate had been given to him. He could not retain and enforce that claim at the same time that the certificate was enforced by his assignee. If he lost that right by the assignment of the certificate he lost it by parting with it to his assignee. In

equity, therefore, we must hold that Sheckels became assignee of McNamara's claim against the District for damages suffered by the taking of his property for public uses.

The only remaining question, then, is whether Sheckels may have a decree in this case against his co-defendant, the District, for the unpaid balance of the damages. It is objected that such relief should be sought by a new bill or by a cross-bill.

It cannot be said that it merely happened to appear in the course of the proceedings that these defendants had a matter of their own in dispute. The equities between these defendants were necessarily disclosed in the development of the complainant's case. The District, through its officer, the tax collector, was about to sell the complainants land for the satisfaction of some claim of its co-defendant. As the District had given their certificate as a payment of the condemnation damages, such sale would have been in substance an attempt to effect a payment of these damages. Thereupon the court arrests the hand of the District. Clearly it is competent, and it is according to good chancery practice, to decree at once that instead of paying its debt for these damages in that way, it must pay them directly to the party entitled to them. Indeed, it would be inexcusable to require the party in such a case to take the expensive and wasteful course of filing a new bill or proceeding by cross-bill. When all the equities of the parties are thus brought before the court in the development of the original case, they should be disposed of without further delay. Such an immediate decree between co-defendants is according to the highest precedents. *Roone vs. Chiles*, 10 Peters, 229; *Pratt vs. Oliver*, 3 McL., 31, affirmed by Supreme Court in *Oliver vs. Pratt*, 3 How., 333.

On the same principle we think it proper to decree, in behalf of the District, that on payment of these damages, the condemnation shall stand as perfect.

The decree will be so modified.

IN RE WILL OF JOHN HOOVER.

1. The "case" to be prepared on a motion for a new trial to be heard in the General Term under the provisions of sections 803, 805, 806, R. S. D. C., is a statement of all the evidence which was produced at the trial; not the result of the evidence but the evidence itself.
2. The only object of such a "case," upon a motion for a new trial, is to raise the question of the insufficiency of the evidence to maintain the case, or the question of excess in the damages awarded by the jury.
3. When the justice trying the cause entertains a motion for a new trial upon exceptions, or for insufficiency of evidence, or for excessive damages, and grants a new trial, the plaintiffs may appeal to the General Term from such decision.
4. *Doddridge vs. Gaines*, 1 MacArthur, criticised and much of the opinion in that case declared to be *obiter*.
5. The court may grant a new trial on the ground that the verdict is against the weight of the evidence.
6. Where a new trial is granted on such ground, an appeal lies to the General Term.
7. But on the hearing in General Term every intendment must be in favor of the action of the trial justice; and especially will this be the case where the verdict was against the validity of a will.

At Law. No. 30,061. Decided February 10, 1890.
Justices HAGNER, COX and JAMES sitting.

MOTION to dismiss an appeal from an order of the court below granting a new trial upon issues of the Probate Court to try the validity of a will.

THE FACTS are sufficiently stated in the opinion.

Messrs. A. S. WORTHINGTON and A. A. BIRNEY for the caveators.

Messrs. MORRIS & HAMILTON for caveatees.

Mr. Justice COX delivered the opinion of the Court:

In the matter of the estate of John Hoover, deceased, it appears that a paper was propounded in the Orphan's Court as the will of John Hoover. A caveat was filed and certain issues were thereby raised, and those issues were sent for trial to the Circuit Court. A trial was had and a verdict

was found unfavorable to the will and in favor of the caveators. A motion was made for a new trial. A new trial was allowed by Justice Montgomery, and an appeal was taken from that order to this court. The motion is now made to dismiss that appeal, upon the ground that the order allowing a new trial is not an appealable order.

The argument in favor of the motion to dismiss is founded upon section 772 of the Revised Statutes of the District:

"Any party aggrieved by any order, judgment, or decree made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the General Term of the Supreme Court, and upon such appeal the General Term shall review such order, judgment or decree, and affirm, reverse, or modify the same, as shall be just."

The argument is, that the right of appeal is limited to orders, judgments or decrees pronounced at special term which involve the merits of the action or proceeding. By implication, that excludes all right of appeal from other orders than those which involve the merits of the proceeding. The argument further is, that the order allowing a new trial does not involve the merits of the action or proceeding, but involves, if I may so express it, the merits of the particular verdict only, because it does not conclude anything, but permits the plaintiff, upon a new trial, to prove his case anew.

I think, upon an examination of the statute, it will be found that motions provided for in section 804, that is, motions for a new trial upon exceptions, or for insufficient evidence, or for excessive damages, stand upon different grounds from all other motions made at special terms, whether for new trial, or any other object.

The motion for a new trial in this case was made upon the grounds, that there was no evidence to sustain the verdict; that the verdict was contrary to the evidence; that it was contrary to the weight of the evidence; that the court

erred in its rulings, &c. There were exceptions taken to the rulings of the justice, and the appeal is founded upon both the exceptions and the allegation that the verdict was against the evidence, or in other words that the verdict was founded upon insufficient evidence, as those words are now interpreted, in the case of the Metropolitan Railroad *vs.* Moore, 121 U. S., 558. It will be necessary for us to examine anew, as we have done so often, these several sections. Section 803 provides :

“If upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.”

Section 804 provides :

“The justice who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.”

Section 805 provides :

“When such motion is made and heard upon the minutes an appeal to the General Term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.”

Section 806 provides :

“A motion for a new trial on a case or bill of exceptions and an application for a judgment on special verdict, or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a General Term.”

Now, it is evident that the word “case” in these different sections has precisely the same meaning. It was a long time

before our lawyers, who were educated in common-law practice, understood what a case was. The only case we had ever heard of was the common-law case stated, which was an agreed statement of facts assented to by counsel for both parties. After a while we learned that the *case* referred to was a statement of all the evidence which was produced at the trial; not the result of the evidence, but the evidence itself; and it is very remarkable that in the case of *Doddridge vs. Gaines*, 1 Mac Arthur's Reports, Justice Olin, who was a New York lawyer, did not seem to understand, even then, as late as 1874, what it was. He finds it substantially to be a case agreed upon by counsel. Now, the only object of a motion for a new trial upon a case which embodies all the evidence taken at the trial, is to raise the question of the insufficiency of the evidence to maintain the case, or the question of excess in the damages awarded by the jury.

In section 806, as we see, a motion for a new trial on a case or bill of exceptions, is to be heard in the first instance in General Term; that is to say, if, after the trial, a party chooses to have a case prepared, embodying all the evidence and certified by the judge below, and to move for a new trial on that case, it can only be on the ground of insufficient evidence or excess of damages, and that motion is to be heard in the first instance in General Term. Whether it be on a case thus made out, or on a bill of exceptions, it is to be heard in the first instance in General Term. When it is heard there, there can be no question of the authority of the General Term to decide that motion, whether that decision would involve the merits of the case or not. Suppose, for example, a witness had been rejected on the ground of personal incompetency in the court below, and that an exception had been taken to that ruling, and a motion for a new trial was made upon the bill of exceptions. It might not appear in the record what his testimony would have been, and therefore the ruling would not clearly involve the merits of the action or proceeding. No one doubts that

upon that motion, made in the first instance on exceptions, the General Term would have the right to decide the motion and either grant a new trial or refuse it. It is argued here that the granting of a new trial does not involve the merits of the action, but it is obvious that the General Term, upon a motion for a new trial, heard there in the first instance, would have the right to grant a new trial or refuse it, in their discretion, whether made upon exceptions or upon a case. So that, so far, at least, the question of involving the merits has nothing to do with the jurisdiction of the General Term to decide upon a motion for a new trial.

Now, the law goes on further, and provides that instead of making up the bill of exceptions or the case, the party may apply to the justice in special term to entertain a motion for a new trial upon exceptions which are simply noted on his minutes and not reduced to form, and upon his minutes of the evidence. The law does not express the object of that provision, but it is to be presumed that it is to facilitate the determination of the question of a new trial without unnecessarily putting the party to the expense or subjecting him to the delay of formally preparing the exceptions and the case, and going up to the General Term. If the court refuses to entertain that motion, then he must complete his bill of exceptions or his case just precisely as if he had made a motion on the case or bill of exceptions to be heard in the first instance in the General Term. Nobody can doubt, when this is done and case is before General Term on this case or bill of exceptions, that the General Term would have the right to decide the motion whether it appears to involve the merits of the action or not. If the judge at the special term does entertain the motion, but refuses to grant a new trial, then the defendant may appeal. When he takes his appeal he must make out the same case or the same bill of exceptions as if he had made a motion for a new trial to be heard in the first instance in General Term. The same question comes up in precisely the same

form, with the same case or exceptions, though it is on an appeal to the General Term, instead of a motion heard there in the first instance. There does not seem to be any reason in the world why the General Term could not entertain the motion in that form precisely as it could entertain it in the first instance, notwithstanding it may not involve the merits of the action or proceeding. The law itself makes no discrimination: "When such a motion is made and heard upon the minutes an appeal to the General Term may be taken from the *decision*," not a *decision in favor of one party or the other*; *in favor of* the motion for a new trial *or against it*, but the *decision*, whatever it may be. And as there would seem to be no reason why the General Term should not entertain the motion equally where it comes up upon appeal and where it comes up to be heard there in first instance, there is no reason for interpolating into this provision any exception or qualifications. It seems to be the object of the law that motions for a new trial upon a case, or upon bills of exceptions, shall reach the General Term in some form or other, either to be heard there in the first instance or in the second instance, that is, by way of appeal; and therefore the question of merits, the question whether the order upon that motion would involve the merits, has nothing to do with the jurisdiction of the General Term. In the absence of any such section as this the inference drawn from section 772 would be legitimate; that is to say, since that section allows an appeal from any order, judgment, or decree which involves the merits, it would be a fair inference from that, that it does not allow an appeal in any other case. It does not, however, in terms, *prohibit* an appeal in other cases. If it did, there might be a conflict between that section and this one, interpreted as we interpret it, but where there is a mere implication or inference drawn from the qualification of the right of appeal in section 772, there is no conflict between that and another section which gives affirmatively a right of appeal in a cer-

tain limited class of cases not within the qualification. So the law reads, substantially, that an appeal may be taken from any order, judgment or decree which involves the merits of the action, and may also be taken from the decision of a justice at the special term upon any motion for a new trial on exceptions, or for insufficient evidence or excessive damages, whether that involve the merits of the action or not.

Reliance, however, is placed upon the case of *Doddridge vs. Gaines*, in 1 MacArthur's Reports. In that case, a verdict was rendered for the defendant and a motion for a new trial was made by the plaintiff. The motion was made upon several grounds, viz: First, that the court erred in its charge to the jury upon the subject of the Statute of Frauds; Secondly, that the court erred in its charge to the jury on the subject of the Statute of Limitations; Third, that the verdict of the jury was contrary to the law as given by the court; and Fourth, that the verdict of the jury was against or contrary to the evidence. The last one is the only one we are concerned with. But this motion was made at special term and the court below certified it to the court in General Term to be heard there in the first instance. In the court in General Term, Judge Olin said: "The motion made for a new trial upon all the grounds mentioned in the paper before us, might, in the discretion of the justice presiding, be ordered to be heard in the first instance at the General Term. That order was made in this case, and the legal effect of that order was simply a refusal of the justice to entertain the motion upon his own minutes of the trial." The express terms of the statute are that where the justice below refuses to entertain a motion for a new trial upon his minutes, then a regular case must be made out. The court said in the beginning of the opinion, "it appears from the printed paper laid before us, which is certainly neither a case nor a bill of exceptions, that an action founded upon contract was brought," etc. So the case came up there not

on appeal from the justice's ruling below, but upon the certificate to be heard in General Term, in the first instance, which they interpreted to mean a refusal of the justice below to entertain a motion for a new trial. And it came up without any case or bill of exceptions; so that there was nothing before the court upon which they could legitimately have acted at all. It is true that Judge Olin goes into a long lecture upon the practice which had prevailed under the statute, but almost the whole of it is simply *obiter*, and in one respect clearly erroneous, if the views we have expressed this morning are correct. He says there that even where the justice below refuses to entertain a motion, and it comes up to be heard in the first instance in the General Term, that it can only be entertained when it involves the merits of the question. The statute is certainly silent upon any such qualification as that. It gives the right to move for a new trial on a case or on a bill of exceptions and it is to be heard in the first instance in General Term in all cases, if the judge below refuses to entertain the motion. We do not think, therefore, that that case is in the way of the determination of this as *res integra*; all that was said there was *obiter dictum*, and it is apparent that in respect of this particular matter, the judge was in error.

Another question is whether an order granting a new trial really does not involve the merits of the action. It is assumed that it does not, because it does not decide the action finally. Of course, when a verdict is obtained, the plaintiff is *prima facie* entitled to a judgment which would be conclusive of the controversy. If a motion for a new trial, on the part of the defendant, is *overruled*, that order necessarily concludes the whole controversy, and does involve the merits of the action. It is claimed that the order allowing a new trial does not involve the merits of the action, because it is not a final determination of the case; but when we remember that, in the absence of such an order, the plaintiff is entitled to a judgment, we see that

this order for a new trial is depriving him of what would be a conclusive determination of the action and what he is *prima facie* entitled to, and where it is rendered on the ground of insufficient evidence, it is a decision that there are no merits in his case upon his own showing. It is a rejection of the plaintiff's claim on the ground that up to that point, on the whole of his evidence, he has no merits. It is, at least, a question whether this is not an order involving the merits but it is not necessary to decide that, in order to dispose of the present appeal.

We hold that the motion to dismiss the appeal must be overruled.

After the rendering of the foregoing decision overruling the motion to dismiss the appeal, the case came on for hearing on the merits, and was argued and submitted; whereupon, on March 31, 1890—

Mr. Justice Cox delivered the opinion of the Court:

In the matter of the will of John Hoover, certain issues were sent by the Orphan's Court to the Circuit Court for trial, two of which related to the question of undue influence, and two to the question of fraud. The jury found in the affirmative as to the first two issues and in the negative as to the third and fourth issues. A motion was made for a new trial before the trial justice and the new trial was granted. An appeal was taken from that order to this court, and a motion was then made to dismiss the appeal on the ground that the order was not an appealable one. We held the contrary of that and therefore the appeal came before us upon its merits.

The certificate of the justice to the statement of the evidence is, "that the foregoing is an accurate and full statement of all the evidence submitted to the jury at the trial of this case on behalf of the respective parties, and it is further certified that in granting a new trial in this case

the court did so solely upon the ground that the verdict was against the weight of the evidence, and did not consider or pass upon any other of the grounds upon which a motion for a new trial was based."

The power of the court to grant a new trial on the ground that the verdict is against the evidence or against the weight of the evidence, is one which has been exercised by the courts of Maryland from time out of mind, and it has also been exercised by the courts of this District ever since its separate organization, and it is too late now to bring it in question.

Upon common-law principles, the action of the trial justice upon such a motion is not reviewable on appeal, but the Supreme Court has decided, as we know, in the case of *Moore vs. The Metropolitan RR. Co.*, 121 U.S., 528, that even a motion of that sort, although addressed to the discretion of the trial justice, can be reconsidered in the court above, that is, by way of appeal from the order passed upon the motion at the trial term. Of course, it is obvious that the appellate court acts at great disadvantage in undertaking to review the action of the trial justice upon a motion of that sort. That was fully appreciated by the Supreme Court in the case of *Moore vs. The Metropolitan Railroad Company*. The court there say:

"The appeal from the special to the General Term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The Supreme Court sitting at special term, and the Supreme Court sitting in General Term, though the judges may differ, is the same tribunal. It is quite true, nevertheless, that the judge sitting at special term, on the trial of a cause by jury, is, from the nature of the case, better qualified (because he sees the witnesses and hears them testify), to judge whether the verdict is warranted by the evidence, than other judges, even of the same court, who are called in to decide the same question upon a report of the testimony in writing; and where the question comes up in General Term, on an appeal, all proper allowance will be made, in

its consideration, for that difference, and its due weight given to the order of the judge at special term denying the motion."

It does not seem to us that upon a hearing of this kind, we are to consider the case *de novo*, as if the evidence were addressed to us originally. It is very obvious that a large part of the evidence, and a material part of it, consists in the demeanor, attitude, and bearing of the witnesses, and in undertaking to review the evidence, the court is hearing the case with only part of the evidence, and does so at great disadvantage. It is our impression that every intendment must be in favor of the action of the trial justice, and we must be satisfied upon the evidence as disclosed to us, that there is error in his action before we can undertake to reverse it.

In regard to will cases generally, all the presumptions of law are in favor of a will unless the incompetency of the testator is very satisfactorily shown. In the rare cases in which verdicts are adverse to wills, there is almost always some element which appeals to prejudice of one kind or another.

The jury themselves may not be aware of it, but it may be apparent to the trial justice whose duty is to keep aloof from the prejudices and passions that actuate parties and may find their way into the jury box, and it seems to me, speaking for myself, that where there is even doubt of fairness of trial in such case, and still more if there is a well founded conviction on the part of the trial justice that there is anything unfair, the policy of the law requires that the issue should be tried a second time. In other words, a will ought not to be overthrown by one trial, unless a case be made out very clearly, especially where there is any ground at all to believe that prejudice may have contributed to the result.

With regard to this particular case, I do not know that it would serve any useful purpose to go into any detailed analysis of the evidence. It is very voluminous and any discussion of that would occupy a great deal of time and

perhaps unnecessarily. We may characterize the evidence in a general way. One issue here, the first one, was: "Was the said paper-writing executed by said John Hoover under the undue influence of suggestions, importunities, and persuasions of the said Rudolph Eichhorn or any other person or persons, when his mind, from its disordered, diseased, and enfeebled state, was unable to resist the same."

The jury found in the affirmative on that; in other words, they found that the writing was executed under the undue influence of suggestions, importunities and persuasion of either Eichhorn or somebody else, and that his mind from its disordered, diseased, and enfeebled state was unable to resist the same.

There is no direct testimony in the case that anybody ever used any persuasion or importunities or suggestions to procure the execution of the will; nor is there any direct testimony that his mind was enfeebled or disordered; I might say, no testimony that would convince any reasonable person. The case of the caveators is based upon inferences and presumptions which, it is claimed, result from and are fairly derivable from, the relation of intimacy and confidence between the intestate and certain persons whose institutions were benefitted by the will; and, on the other hand, all the parties to whom this undue influence is attributed, have been put on the stand and directly deny the use of any persuasions or inducements, and that was followed by evidence tending to show, in the first place, that the will was in harmony with the declarations of intention on the part of the testator made through a series of years, and also that he was a man of so decided a will that he was not amenable to overweening influence from any quarter. It has been said in argument, that there was one set of witnesses testifying in one direction and another set in another direction; that the court believed one set of witnesses and the jury the other, and under those circumstances the verdict ought not to have been set aside. We

do not see that this follows from the action of the court. The fact is, there is no such line of demarcation between the witnesses and no such classification could have been made by the justice in his own mind. Excepting on immaterial or important matters, there is no great conflict between the witnesses as to the main facts testified to. The conflict is between the inferences which the caveators' counsel seek to draw from certain facts which the court below may have believed in the main, on one side, and the direct testimony on the other. The judge may have believed mainly the facts testified to on the part of the caveators, but may have thought that the jury drew irrational inferences or conclusions from those facts, or that they gave undue prominence to some facts and not sufficient to other facts, and he might have supposed the jury were more or less influenced by prejudice, and it is very obvious that he was in a better attitude to come to a conclusion on that point than we are. We know nothing of the composition of the jury in the case; the trial justice did. We can very well understand that prejudice might have entered into this case, and the trial justice had the best opportunity of judging about that.

Now, I may further remark, that if the testimony for the caveatee is true, then it does dispose of these inferences and presumptions. They actually deny everything which it is sought to infer from the testimony on the part of the caveators. It is true, the jurors are the judges, in the first instance, of the credibility of the witnesses, but the trial justice is not to sit simply as a moderator and exercise no judgment of his own. If he sees that the great mass of testimony is on one side and is satisfied that fair weight is not given to it by the jury, either consciously or otherwise, from prejudice, it is his duty to act upon that conviction, and the trial justice can do that much more effectively than we can. Now, all we can undertake to say here is that we will not express

an opinion as to the whole weight of this evidence, but we do not discover, on the face of this evidence, any error in the action of the court below in setting aside the verdict and granting a new trial. There is nothing final about this. The trial justice did not undertake to decide what is within the province of the jury. He simply gives the parties a new chance, and, as I said before, I think, in a case of this kind, where the validity of a man's last will and testament is concerned, where there is any doubt, it should be resolved in favor of a new examination, and we are, therefore, satisfied to affirm the action of the trial justice.

Mr. Justice JAMES said :

I understand that in this decision we imply no opinion as to the effect of the evidence. That question is not before us. Where the appeal is taken from the action of the judge in allowing a new trial, because the verdict appeared to him to be against the weight of the evidence, the question is, whether he committed an error. It is true, this requires us to consider the evidence itself, in determining whether he committed an error in deciding about it; but in determining that question we must necessarily take into account considerations which would not be included if the motion for a new trial were heard here in the first instance on a case stated. In that case our own opinion as to the weight of the evidence would be the matter to settle; but where the appeal is from *his* opinion about that matter, we have to remember that he saw the witnesses, and observed the jury, and that, generally, by reason of his relation to the trial, he had materials for forming a conclusion which do not come here with the record. It must appear to us that, after allowing for all of these considerations, he has manifestly committed an error, before we reverse his action.

Another observation occurs to me. In courts of the United States, the judge has a good deal more to do with the trial by the jury than is permitted in some of the State courts.

Fortunately, it is still supposed that the court is competent to aid and guide the jury, and is something more than a conduit for instructions prepared by counsel. It may even express its own opinion of the evidence, provided it tells the jury that they are still free to form theirs.

We conceive that all of these considerations are pertinent in determining whether the judge committed an error in this case.

THE UNITED STATES EX REL. CHARLES R. MILLER

vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS.

The Commissioner of Pensions is invested with a judicial discretion in his interpretation of the law as to the amount due a pensioner for a given disability, and this court cannot interfere by mandamus to correct it.

At Law. No. 30,102. Decided February 17, 1890.
Justices HAONER, COX and JAMES sitting.

PETITION for mandamus against the Commissioner of Pensions commanding him to allow an increase of pension. Heard in the General Term in the first instance.

THE FACTS are stated in the opinion.

Mr. J. G. BIGELOW for the relator.

Mr. JOHN BLAIR HOGE for respondent.

Mr. Justice COX delivered the opinion of the Court:

The case of The United States, on the relation of Charles R. Miller, against John C. Black, formerly Commissioner of Pensions, and now against Green B. Raum, the present Commissioner, has been submitted to us upon printed briefs. The application is for a mandamus, or a rule to show cause why a mandamus should not issue against the Commissioner commanding him to issue a new pension certificate to the relator, allowing him a pension at the rate of \$72 per month from June 17, 1878.

At the close of the war, acts of Congress were passed, as we all know, providing different rates of pension for disabled parties, varying according to the different forms of disability. For example, an Act of March, 1873, provided one rate of pension for persons who had lost one hand or one foot, and a different rate for those who had lost both arms or both hands, or who had become blind or who had

become so helpless as to require the regular personal aid of another person. And subsequently these rates of pension were increased by several acts of Congress.

This relator was rated by the office in the first class, *i. e.*, of those who were only partially disabled on the ground that he had become disabled in one foot—his left foot. Several different certificates were issued to him at different times by which he was allowed \$8 per month from the date of his discharge; \$25 per month from June 6, 1866; \$31.25 per month from June 4, 1872, and \$50 per month from June 4, 1874. He claimed, however, that he was entitled to be rated in the other class, *viz.*, of those who were wholly disabled and dependent upon the assistance of a third person, and he made very persistent applications to the office to be re-rated. The Commissioner of Pensions decided against him, and upon an appeal to the Secretary of the Interior the decision was at first affirmed, but afterwards Secretary Teller addressed this communication to the Commissioner:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February 12, 1885.*

THE COMMISSIONER OF PENSIONS:

SIR: Herewith are returned the papers in the pension claim, certificate No. 55,356, of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held "the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and is, therefore, entitled to \$30 per month under the Act of March 3, 1883, which has been allowed him by your office.

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put

his shoe and stocking on his foot of the injured leg, for the reason that the "nearest point that can be reached by hand from foot is 23 inches," and for the further reason that from "necrosis of the lower vertebræ of the spine, producing ankylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back.

After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

The decision of the 6th instant is, therefore, overruled in so far as it denies that the pensioner requires regular aid and attendance.

Very respectfully,

HENRY M. TELLER,
Secretary.

That case is provided for by several laws. The Act of March, 1873, provides a pension of \$31.25 per month for all persons who had lost their sight or both hands or both feet, or had become permanently and totally disabled so as to require the regular aid and attendance of another person; and by the Act of June 18, 1874, it was provided that in case of blindness or loss of both hands or feet or total helplessness requiring the regular personal aid of another person, the pension should be increased from \$31.25 to \$50 per month. Again, by Act of June 16, 1880, it was enacted that all those then—that is, at the date of that act—receiving pension at the rate of \$50 per month under the Act of June, 1874, should receive \$72 per month from June 17, 1878.

Now, the relator assumed that when the Secretary of the Interior had decided that the claimant was in the category of those who were totally disabled and required regular aid and assistance, it was in effect a decision that he was entitled to be rated for a pension of \$72 per month; and thereupon he applied for that relief, and it was denied. The Commissioner held that he did not fall within the

terms of the law. Thereupon, he applied to this court for a rule to show cause why a mandamus should not issue, requiring the Commissioner, as he expressed it, to carry out *fully* the decision of the Secretary of the Interior. Upon examination of his petition, upon demurrer, the court were against him, holding that the matter was committed to the judgment and discretion of the Commissioner of Pensions, and we could not interfere. The case was then carried by writ of error to the Supreme Court and the court there say, after reciting the application of the relator in the court below:

"The petition goes on to state that the former Commissioner of Pensions refused to carry out the Secretary's decision to its full extent, and that the present Commissioner, the respondent, still refuses. If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be *prima facie* ground for at least calling upon him to show cause why a mandamus should not issue. This was all that the petitioner asked, and this the court refused. As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions.

"The appellate tribunal in the present case is the Secretary of the Interior, who has no power to enforce his decisions by mandamus, or any process of like nature; and therefore a resort to a judicial tribunal would seem to be necessary, in order to afford a remedy to the party injured by the refusal of the Commissioner to carry out his decision. But it is suggested that removal of the contumacious subordinate from office, or a civil suit brought against him for damages, would be effectual remedies. We do not concur in this view. A suit for damages, if it could be maintained,

would be an uncertain, tedious, and ineffective remedy, attended with many contingencies, and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus. Whether it will turn out to be such when all the circumstances are known, can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted. The judgment of the court below is, therefore, reversed, and the cause remanded with instructions to grant a rule to show cause as applied for by the petitioner."

The petitioner again came into this court and a rule to show cause was accordingly issued, and a return has been made by the present Commissioner of Pensions, the substance of which is, that the Secretary of the Interior did not decide as to the rate of pension to which the relator was entitled at all, but reversed the decision of the Commissioner only on one question—that is, the question of fact, whether the relator was so totally disabled as to require the regular aid and attendance; but that he left unsettled the question as to what rate of pension the relator would be entitled to under those circumstances; and with great respect for the court, he further claims that the law has devolved upon him the power of deciding this question; that he is charged with the duty of examining into these claims and determining what rate of pension is to be allowed; that in the exercise of that judgment and discretion he has come to the conclusion that this relator was not entitled to the benefit of the Act of 1880, because that applies only to persons who were receiving \$50 per month at the date of that act, and this relator had never satisfied the Department before that date that he was entitled to be classed among

those totally disabled, and therefore had not been receiving a pension of \$50 per month, and that, therefore, the terms of the act of 1880 did not apply to him; and he further shows that an appeal from his decision was taken to the Secretary of the Interior, and the Assistant Secretary for the time being, affirmed the decision.

Upon this showing, the question for us is, whether we can consider it a mere ministerial duty of the Commissioner of Pensions to carry out what is supposed by the relator to be the decision of the Secretary of the Interior—that is, to rate the relator at \$72 per month, or must hold that the question was committed to the Commissioner's judgment and official discretion to determine, whether that is the rate of pension to which the relator is entitled, and must dismiss the application for mandamus, simply upon the ground that it would be an infringement upon the jurisdiction conferred upon the Commissioner of Pensions. If we had any doubts on this subject they would be relieved by the decision of the Supreme Court in a case similar to the present one and commenced at the same time that this relator's application was made to this court.

Similar applications were made on behalf of Oscar Dunlap and Frank Rose. In those cases there was no question at the time of the application that the relators were within the class of those suffering from total disability; but the question still remained, to what rate of pension the parties were entitled, and there the same contention took place on the part of the relators as in the present case. It was contended there that, under the Act of 1880, he was absolutely entitled to a pension, at the rate of \$72 per month, and that it was a plain ministerial duty of the Commissioner of Pensions, without any discretion, to award him a new certificate at that rate. But there, as here, exactly, the Commissioner decided that the reason why the claimant's rate was not advanced to \$72 per month was, that he was not, on June 16, 1880, the date of the act, receiving a pension at the rate of

\$50 per month, nor was he entitled to receive a pension of \$50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the Act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at \$36 per month under the Act of February 28, 1877. The decision proceeds to discuss further the reasons for the conclusion to which the Commissioner had come.

There, just as here, the claimant had been rated as one of those who were only partially disabled, but had not satisfied the Department that he was entitled to a different rate of pension at the time he made his application, and we held that we could not interfere with the Commissioner. That case went up upon writ of error, and the Supreme Court, after referring to the leading cases on the subject of mandamus, say:

"The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, *even where those duties require an interpretation of the law*, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is a service which they are bound to perform without further question, then, if they refuse a mandamus may be issued to compel them.

"Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced

by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts."

We understand that to be the law of this case. In the present case, the Commissioner, upon a full examination of the facts before him, has decided that this relator is only entitled to receive \$50 per month under the Act of 1874, and on appeal from him to the Secretary of the Interior for the time being, the acting Secretary has affirmed that decision. We hold that there is no appeal to us from that rule. We cannot interfere by mandamus with the exercise of the judicial authority and discretion which has been invested in these officers by law of the United States; and therefore the judgment must be for the respondent.

Rule dismissed.

HATTIE MAY McPHERSON

vs.

THE DISTRICT OF COLUMBIA.

Where the District authorizes excavations in a public street so as to leave the street in an unsafe condition for pedestrians, it is at once chargeable with the duty of seeing that proper safeguards are provided to prevent accidents; an instruction, therefore, which directs the jury to find for the defendant, unless they believe that it had actual or constructive notice by lapse of time of the insufficiency of such safeguards, should not be granted.

At Law. No. 27,514. Decided February 26, 1890.
The CHIEF JUSTICE and Justices COX and JAMES sitting.

MOTION by plaintiff for a new trial on a bill of exceptions.

THE FACTS sufficiently appear in the opinion.

MESSRS. GEORGE E. HAMILTON and J. J. DARLINGTON for plaintiff.

MESSRS. S. T. THOMAS and SAMUEL SHELLABARGER for defendants.

Mr. Justice JAMES delivered the opinion of the Court:

The declaration alleges that the plaintiff was injured by means of the negligence of the defendant in allowing the streets of Washington to remain in a dangerous condition, by reason of a deep opening in the roadway at the intersection of F street north and Seventh street west, made therein by the sufferance or express permission of the defendant, and in allowing the said opening to remain unguarded, or insufficiently guarded, and without placing, or causing to be placed sufficient lights or barricades at or near the said cavity.

The case stated shows that a company known as the Heat and Steam Power Company was, by permission of the defendant, laying pipes along Seventh street and F street,

filling up its trenches as the work proceeded; that a part of this excavation was still open at the corner of Seventh and F streets, and had been in that condition for about a week when the accident to the plaintiff happened; and that the plaintiff fell into this hole at about 6 o'clock in the evening of December 2, 1886, while crossing Seventh street, on her way home from her work, and was very seriously hurt; being unconscious when lifted out of the pit, and so remaining until after she had been carried to the Emergency Hospital.

The principal questions at the trial were, first, whether this dangerous place was left properly guarded and lighted when the Heat and Steam Power Company suspended work at half-past 5 o'clock, half an hour before the accident; and, second, if it was so left, whether it continued so protected at the time of the accident. On these questions there was a conflict of testimony; but the jury found a verdict in favor of the plaintiff. The defendant filed a motion for a new trial in the Circuit Court, on the ground, among others, that the verdict was against the weight of the evidence. The motion was heard there, and the cause now comes here on appeal from the decision of that court refusing a new trial.

It would serve no useful purpose to review the evidence set out in the somewhat voluminous case stated. We have carefully considered it, and think it is sufficient to say that we are satisfied that the verdict is in accordance with the weight of the evidence and that the damages awarded were not excessive.

The appeal was also on a bill of exceptions; and this requires an examination of the instructions to the jury, on which the verdict was founded.

The defendant presented twelve prayers, of which the first five, and the ninth, tenth, and eleventh were refused. At the argument, however, the refusal of the tenth was the only ground of exception on which he insisted. In order to consider the question thus raised it is necessary to refer to two

of the defendant's prayers which were granted, namely, the sixth and the eighth. The sixth was as follows:

"The jury is instructed that the defendant is not required to keep the streets in the city of Washington in such condition as to secure absolute immunity from danger to persons using them, but only to see that they are reasonably safe for the use of persons exercising ordinary care and prudence; and if the jury find from the evidence that the opening in the street, in which the plaintiff fell was so protected as to be reasonably safe for the passage of pedestrians while exercising ordinary care and prudence, then the defendant is not liable in this action."

This instruction meant, of course, "so protected, at the moment of the plaintiff's fall, as to be reasonably safe for the passage of pedestrians. The eighth prayer of the defendant, which was granted, was as follows:

"If the jury find from the evidence that, prior to the happening of the accident complained of in the declaration, the opening described in the declaration was guarded by barricades, earth, stones, and light, sufficiently to protect pedestrians or other persons using the street from danger by falling therein, while in the exercise of ordinary care, *and* that such protection was rendered insufficient by removal, by an unforeseen accident, or the act of some person not acting in the employment of the defendant, or of the Washington Heat and Power Company, *that could not be reasonably anticipated*, of any portion of said barricade, earth, or stones—then the jury, in order to find the defendant liable in this action, must find, first, that the defendant had actual knowledge of such removal, and did not replace or remedy the same, or, secondly, that the removal had been made and the insufficiency of the protection had remained for so long a time prior to the accident that the defendant is chargeable with constructive notice thereof in time to have remedied the same."

It is to be observed that, in this prayer, the defendant

recognized the principle that there might be removals which could be reasonably anticipated or feared, and against which, therefore, it was for the defendant to provide; and it further concedes that, as to *such* removals, the question of notice that the protections had actually been removed, was inapplicable and immaterial. It is also to be observed that this instruction left the jury to determine whether the lapse of time between the supposed removal of the protections and the happening of the accident, as shown by the evidence, was such as to bring home to the defendant constructive notice. The meaning of the tenth prayer, which was refused, can now be better considered in the light of these two, which were granted. It was as follows:

"The jury is instructed that the plaintiff is not entitled to recover in this action, unless the jury find from the evidence, *first*, that the guards about the excavation mentioned in the declaration were not, at the time of the accident complained of, such as were required at the hands of the defendant, according to the rule of reasonable care as defined by defendant's instruction No. 6; and also, *secondly*, that the defendant, or some one, its officer or agent, had either actual or constructive notice of any defect in such guards aforesaid, which may have existed at the time of the accident, in time to have remedied the same before the accident, in the exercise of reasonable diligence; *and* if the jury believe from the evidence that half an hour or thereabouts before said accident occurred the safeguards were such as required aforesaid, then the defendant is not chargeable with such constructive notice, as aforesaid, of any changed condition which made such guards defective and occasioned the accident complained of."

This prayer contained two distinct propositions. The first is, that the jury must find not only that the excavation was not properly guarded at the time of the accident, but that the defendant had either actual or constructive notice of that state of things long enough before the accident to

enable it to remedy the defect. The second proposition is that if the jury should find that these guards were sufficient only half an hour before the accident then the notice required by the first proposition could not be imputed to the defendant. We think that the first proposition was too broad. It referred to whatever defect of protection existed at the time of the accident, without reference to the time of its origin, and required proof of actual or constructive notice of any such defect. Now, the evidence fairly raised the question whether the protections around this pit had at any time been sufficient; that is to say, whether they were made sufficient when the Heat and Power Company quit work that evening. If the jury should find that the defect happened in that way, it would still have been obliged to apply this instruction, and must have considered whether there was proof that the defendant had actual or constructive notice of the defect so arising. In order to determine whether the defendant's liability depended on its having such notice, in that case we must consider its relation to the danger which called for protection.

The trenches for the Heat and Power Company's pipes, extending, as the record shows, through many streets, were, of course, made under a permit of the District authorities. Before that time these streets were in safe condition for the use of pedestrians and others, and the defendant authorized their being put into an unsafe condition, with knowledge that the safe condition would require safeguards. In the next place, it knew what actually followed that permit. For weeks before the accident it knew that such guards had in fact been needed at various points along the line of the company's trenches, and for at least a week that this particular pit existed and required protection. It would have been charged with notice that it had a duty to perform—the duty to see to it that safeguards were provided—even if the trenches had been made without its authority; *a fortiori* it stood charged with notice of that duty when it had au-

thorized the very danger which required safeguards. If it had notice of this duty, any failure to place or cause to be placed sufficient safeguards every evening, was its own dereliction. Of course its liability for such dereliction could not depend upon its having a still further notice, either actual or constructive, of its own default. Yet this is, in effect, precisely what the instruction asked by the defendant would have required, if we are right in holding that it included defective protection existing when work at this pit was suspended for the night.

We have not overlooked the defendant's claim that the first part of the prayer which we have just considered did not contain a separate proposition. It was insisted at the argument that the object of the whole prayer was to present the question whether the lapse of only half an hour was enough to charge the defendant with constructive notice that a protection which was sufficient at the beginning of that time had afterwards become insufficient, and that a fair construction would limit the meaning of the first part of the prayer so as to refer it only to the special case supposed in the last. It is enough to say that, even if it could be shown by argumentation to have that meaning, and to be correct when so limited, it must nevertheless be refused, just because it was not plain to the jury on its face and needed such argumentation.

We think there was no error in refusing the instruction asked, and therefore the judgment is affirmed.

SAMUEL FOWLER

vs.

ANDREW SAKS ET AL.

1. The building regulations of the District of Columbia give the right to take down and remove and reconstruct a party-wall on condition that the expense be paid exclusively by the building owner, and that "he shall also make good all damage occasioned thereby to the adjoining owner or his premises."
2. One cannot take the benefit of a building regulation and repudiate the condition on which it is given.
3. The rule that where there is an independent contractor he, and not the employer, is liable for injuries to third persons, is subject to a number of exceptions, among which is where the employer is under pre-existing obligations to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation of employer and contractor; thus, where one is permitted by municipal regulation to remove and reconstruct a party-wall on condition of making good all damages to the adjoining owner or his premises, he cannot shift the responsibility for resulting damages to the contractor who has done the work.

At Law. No. 26,488. Decided March 24, 1890.
Justices HAGNER, COX and JAMES sitting.

MOTION for a new trial on exceptions taken in an action to recover damages to plaintiff's building.

THE FACTS are sufficiently stated in the opinion.

Messrs. CALDERON CARLISLE and W. G. JOHNSON for the appellee.

The instruction granted at the instance of the plaintiff is amply sustained by the building regulation, which is but a statement of the common law. *Eno vs. Del Vecchio*, 6 Duer, 17.

It has frequently been held that the court is not bound to grant an instruction in the language asked; if the proposition of law involved in the prayer asked be given to the jury, it is not error to refuse in a particular form of words nor to refuse to give it twice. *Clymer's Lessee vs. Dawkins*, 3 How., 688; *Cont. Imp. Co. vs. Stead*, 95 U. S., 162, 666;

Railroad Co. vs. Whitton, 13 Wall., 299 ; Tweed's Case, 16 *Id.*, 515, 516, 517; Carpenter vs. Washington and Georgetown R.R., 3 Mackey, 225.

"The owner cannot escape liability by letting work out like this to a contractor, and shift responsibility on him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance." *Chicago vs. Robbins*, 2 Black, 426.

In *Vanderpool vs. Hurson*, 28 Barb., 198, the court says an exception to the rule that the contractor and not the owner is responsible is, "where the work or erection is itself a nuisance or where the injury was a necessary result of the contract. *Cooley on Torts*, 373, 547 ; *Eno vs. Del Vecchio*, 6 Duer, 28."

"The party making the addition (to a party-wall) does it at his peril, and if injury result he is liable for damages. He must insure the safety of the operation." *Brooks vs. Curtis*, 50 N. Y., 644.

"If the owner of real estate suffer a nuisance to be created or continued by another on or adjacent to his premises, in the prosecution of a business for his benefit, when he has the *power* to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons." *Clark vs. Fry*, 8 Ohio St. Rep., 359 ; and quoted with approval in *Chicago vs. Robbins*, *supra*.

"The rule is, that where the person for whom the work to be done is under a pre-existing obligation to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor." *Baltimore vs. O'Donnel*, 53 Md., 117 ; *Cooley on Torts*, 373, 547 ; *Bowers vs. Peate*, 1 Q. B. Div., 321 ; *Tarry vs. Ashton*, *Id.*, 314 ; *Dalton vs. Angus*, L. R. App. Cases, 740 ; *Hughes vs. Percival*, L. R., 8 *Id.*, 443.

It is worthy of note also, that all of these cases represent the later adjudications of this question.

Bowers vs. Peate, was decided in 1876; *Baltimore vs. McDonnell*, in 1880; *Dalton vs. Angus*, in 1881; and *Hughes vs. Percival*, in 1883.

Messrs. ENOCH TOTTEN and S. T. THOMAS for appellants:

The case falls within the rule that the contractor and not the owner is liable. This doctrine of independent contractor is succinctly and clearly stated by Mr. Cooley in his *Treatise on Torts*, 548 and 549.

It must be conceded that the erection of the new building by the Messrs. Saks was a work perfectly lawful in itself, and that the prosecution of it would not necessarily result in a nuisance. If this be so, then it was perfectly competent for the defendants to commit the execution of their plans to others.

The case of *Scammon vs. City of Chicago*, 25 Ill., 424, is an example of the doctrine invoked here. That case was an action by the city to recover the amount of damages covered by a judgment against the city in respect of injuries sustained by one Ormsby by falling into an excavation in the street in front of Scammon's lot. It was urged in that case that the contractors and not the owners of the property were liable; and it was held that the rule in cases of this character is, if the nuisance necessarily occurs in the ordinary mode of doing the work, that the owner or occupant is liable, but if it is from the negligence of the contractor or his servants he alone should be responsible. "The omission" (says the court) "to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work, but from the negligence of the contractors or their workmen; hence, the appellants are not liable for the damage sustained by Ormsby." See also *Hilliard vs. Richardson*, 3 Gray, 349; *Chicago vs. Robbins*, 2 Black, 428; *Robbins vs. Chicago*, 4 Wall, 677; *Water Company vs. Ware*, 16 *Id.*, 566; *Railroad Co., vs. Haming*, *Id.*, 649; *Painter vs. Mayor*, 46 Pa., 213; *Erie vs. Calkins*, 85 *Id.*, 247; *Vanderpool vs. Husson*, 28 Barb., 196; *McGuire vs. Grant*, 1 Dutch.,

35, 36; *Boswell vs. Laird*, 8 Cal., 469; *Kellog vs. Payne*, 21 Iowa, 575; *McCaffrey vs. Spuyten Duyvil and Port Morris R.R. Co.*, 61 N. Y., 178; *Clark vs. Fry*, 8 Ohio St., 358; *Cuff vs. Newark, &c., R.R. Co.*, 35 N. J., 17 (S. C. 10 Am. Rep. 205). *Eaton vs. European, &c., Rwy. Co.*, 59 Me., 520 (S. C., 8 Am. Rep. 430).

Shearman and Redfield, in their work on Negligence, in Sec. 77, state the rule, as the result of the decisions, thus: "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect of the details of the work, is clearly a contractor and not a servant."

To the same effect are the English cases; see *Allen vs. Haywood*, 7 A. & E., 961; *Peachey vs. Rowland*, 16 Eng. L. & Eq. Rep., 442; *Knight vs. Fox*, 5 Exch., 721; *Overton vs. Freeman*, 73 E. C. L., 866; *Steel vs. The South Easton Rwy. Co.*, 81 *Id.*, 550.

The court below failed to take the distinction between an action to recover damages for injuries to a building, as in this case, and the case of a man who excavates his land so close to that of another as to injure the other's natural support. In the latter case the rule is, as shown by all the authorities, that the owner would be liable without proof of negligence. *Dodd vs. Holme*, 1 Adol. & Ellis, 493; *Wyatt vs. Harrison*, 3 Barn. & Ad., 871; *McGuire vs. Grant*, 1 Dutch., 356, 358; *Foley vs. Wyeth*, 2 Allen, 131, 133; *Charless vs. Rankin*, 22 Mo., 566, 571; *Farrand vs. Marshall*, 21 Barb., 419; *Gilmore vs. Driscoll*, 122 Mass., 199; *Shafer vs. Wilson*, 44 Md., 268; *Quincy vs. Jones*, 76 Ill., 221.

But this rule applies to the land itself, and not to buildings upon it. For an injury to buildings it is well settled that the party making the excavation on the adjoining land can only be held liable where there is a want of due care.

Partridge *vs.* Scott, 3 M. & W., 220; Walters *vs.* Pfiel, Moody & Malk., 362; Thurston *vs.* Hancock, 12 Mass., 220; Clark *vs.* Foot, 8 Johns, 421; Panton *vs.* Holland, 17 *Id.*, 100; Ia Sala *vs.* Holbrook, 4 Paige, 169.

Mr. Justice Cox delivered the opinion of the Court:

This is an action brought to recover damages for injuries alleged to have been done by the defendants to a building belonging to the plaintiff, immediately north of and adjoining the new store erected by Saks & Company on the corner of Pennsylvania avenue and Seventh street.

It is known that the lot was occupied formerly by another building some five stories in height, well known in judicial history as having been erected by Miss Dermott, which passed afterwards into the ownership of Mr. Jesse Wilson. Mr. Fowler bought his lot in 1850, adjoining this building, and made use of the north wall of it as a party-wall, resting his rafters in that wall. In 1884 the defendants, Saks & Company, entered into possession under an agreement with Mr. Wilson for a twenty-years lease, which agreement was performed on Mr. Wilson's part by the execution of such a lease on the 16th of October, the same year. As soon as they entered into possession, they entered into a contract with Kenderdine and Paret to pull down the existing building and erect a new one, which is the present structure. In the course of that work it became necessary to remove the north wall which had been used as a party-wall. In doing so, the contractors did undertake to shore up and protect the building of Mr. Fowler, the plaintiff, but, as he alleges, did it very imperfectly, and the consequence was that his building was weakened, cracked and settled, and was permanently injured.

At the trial of the case, only one instruction was given by the court at the instance of the plaintiff. That related merely to the measure of damages. There were thirteen instructions asked by the defendants. The trial resulted in a verdict for the plaintiff for \$2,784; there was a motion for a

new trial before the trial justice, on exceptions, which was overruled, and an appeal was taken to this court.

One of the complaints in the argument, as to rulings of the court, may be resolved into three propositions:

First. That the declaration in this case relies entirely upon the alleged neglect of the defendants in failing to properly protect the building of the plaintiff in the course of their operation of building; and

Secondly. That the court allowed the plaintiff to spring upon the defendants, in the trial, one of the building regulations of the District, which was not made the foundation of the claim in the declaration at all. It reads as follows:

"The inspector of buildings shall, upon the application of any building owner or his authorized agent, examine any or all existing party or division walls; if deemed by said inspector to be defective, out of repair or otherwise *unfit for the purpose of new buildings about to be erected*, such party or division wall shall be made good, repaired, or taken down by the building owner, as the decision may be, the cost and expense of which repair or removal, together with the expense of the new wall or walls to be erected in lieu thereof shall be borne and paid exclusively by him; *and he shall also make good all damage occasioned thereby to the adjoining owner or his premises.*"

And it is further claimed that the trial judge rested his rulings upon that building regulation; whereas, it is said, that was not the foundation of the claim in the declaration.

And the third proposition is, that so much of this regulation as imposes upon the building owner the duty of making good all damage caused by taking down a party wall is not strictly a building regulation but is entirely *ultra vires* and void.

On examining the declaration, we find that it is not confined to the allegation of negligence on the part of the defendants as to the manner in which they prosecuted their work, but it alleges that "it was the duty of the said defendants to use such care, skill, and workmanship in the

destruction of said building on said lot * * * as to protect the plaintiff from all loss or injury to said premises by reason of the destruction of said building and party-wall by said defendants." "And, further, that it was the duty of said defendants to care for plaintiff's said building during the time occupied in the prosecution of said work, and to properly and skillfully rebuild and shore said party-wall, and to *make good all injuries occasioned to plaintiff's said building and to repair all damage occasioned to plaintiff's said building by the said works of defendants* or by the failure of defendants to do all acts necessary by them to be done."

"Yet," and here is the breach alleged, "the said defendants, by their said agents and servants, so negligently, unskillfully, wrongfully, and improperly tore down said building and said party wall so adjoining and forming part of plaintiff's said building, as aforesaid, without properly shoring up, propping up, or duly securing plaintiff's said building from damage by reason of their tearing down and destroying the said building and party-wall as aforesaid, so that for want of such proper shoring up, propping up, or duly securing thereof the said house of the plaintiff became and was by and through the tearing down and destroying of the said building and party wall adjoining the plaintiff's said premises, greatly weakened, damaged, and injured, and, as a consequence thereof, in part fell down, by reason of which negligent, unskillful, improper, and wrongful tearing down of said building and party-wall, and of the defendant's failure properly and skillfully to guard and protect the plaintiff's said building, and by reason of said defendant's failure to care for plaintiff's said building during the time occupied in the prosecution of said work by said defendants, and of their failure to *make good all injuries occasioned to said building and to repair all damages occasioned to said building by the said works of said defendants*, and to properly and skillfully rebuild and restore said party-wall; and by reason of the failure of defendants to do all acts necessary by them to be done the plaintiff was and is greatly damaged," &c.

So that we think the declaration is not founded upon merely alleged neglect of the defendants, but upon their *duty to make good all damages* occasioned by the prosecution of their operations in the particulars mentioned.

When we come to see the instructions of the court, we find that, at the instance of the plaintiff, only one instruction was given, which is as follows:

“If the jury shall find for the plaintiff, the measure of damages is such amount as the jury may find from the evidence was expended by plaintiff for the necessary preservation of his premises during the work of taking down and putting up the party-wall, together with such sum as the jury may find would be necessary to restore the plaintiff's premises to the same condition they were in before the taking down of said party-wall, and in addition thereto such amount as the plaintiff would necessarily lose in rent during said restoration, if they shall find that plaintiff would be subjected to such loss of rent.”

The court refused the thirteenth instruction asked by the defendants but granted it with a modification. That instruction was:

“If the jury shall be satisfied from the evidence that the old wall between the plaintiff's building and the premises occupied by the defendants was skillfully and carefully taken down, and that the new party-wall was constructed with reasonable care and skill, and that the property of the plaintiff was reasonably cared for and protected during the building thereof and then restored with reasonable care and skill and with proper material, the defendants are entitled to your verdict. The defendants possessed the lawful right to take down the old building and to build a new one in its place, provided such work was done with reasonable care and skill and with proper material.”

The court refused to grant that, except with the qualification: “Provided, *that the building of the plaintiff*, so far as affected by the taking down and erection of said party-wall,

was restored to the like good condition in which it was at the time of taking down said party-wall."

The court gave no instruction as to what hypothetical state of facts would justify a verdict for the plaintiff, but it may be inferred from these two instructions; that is, the instruction as to the measure of damages and the qualification I have just mentioned, that the court did deem it the duty of the defendants to make good the damages occasioned by the destruction of that party-wall. The court does not in terms derive this duty either from the building regulations or from the common law, but if the duty is prescribed by either—validly prescribed by the building regulation or one that is enjoined by the common law—that would be sufficient to vindicate the rulings of the court. That brings us to the subject of party-walls in general, and the rights and obligations connected with them.

What we understand now by a party-wall had no existence at common law, except by convention between coterminous proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience or for any purpose whatever without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division wall between himself and his neighbor, partly upon his neighbor's land is therefore purely the creature of legislation.

Under authority of the deeds executed by the original proprietors of land within the District to the trustees, Beall and Gantt, which are very well known in this District, and of the Act of Maryland of 1791, making the cession of the District to the United States, General Washington promulgated certain building regulations. One of these is in the following terms:

OCTOBER 17, 1791.

"That the person or persons appointed by Commissioners to superintend the buildings may enter on the land of any person to set out the foundation and regulate the walls to

be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party-walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be re-imbursed one moiety of the charge of such party-wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall any use or break into the wall. The charge or value thereof to be set by the person or persons so appointed by the Commissioners."

This building regulation, so authorized, is the foundation and the only source of the right claimed by any one here to locate his party-wall one-half on his neighbor's land. If the regulation stopped there, and we conceive a case in which the party-wall is thus established, the question would naturally arise, has either party a right, afterwards to disturb that party-wall, pull it down, build up a larger one or make an addition to the existing wall, underpin it or raise it higher for his own purposes. On general principles, it would seem not, for the simple reason that each party then has a vested right in that wall, whether you call them tenants in common or tenants in severalty as to the parts occupying their respective lots of ground. If tenants in common, each has the right to have his interest in common undisturbed; if they are tenants in severalty, each has the right to one-half of the wall in severalty, and to the support of the other half. On general principles, it would seem that neither one has the right to disturb the wall. This seems to be the current of the authorities, with this simple qualification, that if the wall becomes dilapidated, so that it actually needs to be reconstructed, then either party may, for his own protection, remove the wall; but, with that exception, the rule, I think, seems to be that, at common law, independently of any legislation, neither party would have a right to pull down the wall once established. The cases on this subject will

be found collated in 2 Washburn on Easements, pages 604 to 621. There are cases, however, which hold that either party may underpin a wall or raise it higher for his own purposes, as long as he can do it without prejudice to the adjoining building. The cases on that subject will be found referred to in Cooley on Torts, on pages 373 and 374, and also collated in the case of Brooks against Curtis, in 50 N. Y., 639. But in those cases it does not become a mere question of care or diligence. There is an absolute duty imposed upon the proprietor who makes an alteration in the wall for the purposes mentioned, to see that his neighbor's property is not injured, and whether he exercises care and skill or not, he is absolutely responsible for any injury that results from the change.

We may assume then, that, in the absence of legislative sanction, one of two coterminous owners has no right to pull down a party-wall; if he does so, he commits a trespass and he is liable in damages, and the natural measure of damages would be what it would cost to restore the property of his neighbor to the condition in which it was before he entered upon that undertaking. That is his common law liability, and we may say, his duty.

In that condition of the law, a new building regulation is enacted. By Act of Congress of June 14, 1878, the Commissioners were authorized to establish such new building regulations as they may deem proper. Thereupon a new building regulation was added to the existing ones, which has been already read, but I will read it again:

"The inspector of buildings shall, upon the application of any building owner or his authorized agent, examine any or all existing party or division walls, and if deemed by said inspector to be defective, out of repair, or otherwise unfit for the purpose of new buildings about to be erected, such party or division wall shall be made good"—that is the important part in the present case—"repaired, or taken down by the building owner, as the decision may be, the

cost and expense of which repair or removal, together with the expense of the new wall or walls to be erected in lieu thereof"—that is, whether defective, out of repair, or otherwise unfit for the purpose of erecting a new building thereon—"shall be borne and paid exclusively by him, and he shall also make good all damage occasioned thereby to the adjoining owner or his premises."

Now, it is said that this latter part is not a building regulation, but is an ordinance by these Commissioners that the building owner should make good all damages occasioned by his act. If there had been a pre-existing right to take down the wall and then the Commissioners had afterwards attempted to establish an independent regulation, to the effect that the party exercising that right should have to pay damages for it, perhaps it might be contended, with at least plausibility, if not success, that such a regulation would not strictly be a building regulation, but would belong to the legislative authority; but, in the present form, I think the building regulation must be read as prescribing the condition upon which this privilege or easement of taking down and reconstructing a party-wall is conferred. It should be remembered that there is no right at all to remove a party-wall, except such as is derived from this building regulation. Now, it does seem that the Commissioners, in ordaining (if I may use that expression) such a building regulation, giving that privilege which is an unusual one—a departure from the common law—had a right to prescribe such conditions as were just and reasonable. We cannot doubt that this would be a just and reasonable condition. It is to be read, therefore, as giving the right to take down and remove and reconstruct this party-wall on the condition that the expense of it shall be paid exclusively by the building owner, and that "he shall also make good all damage occasioned thereby to the adjoining owner or his premises." The defendants invoke that regulation as a warrant for their proceeding. They cannot take

the benefit of that building regulation and repudiate the conditions on which it is given. The Supreme Court, in a recent case just decided, *Keller vs. Ashford*, used language appropriate to that question. That case, it will be remembered, was one in which one Thompson conveyed certain real estate to Dr. Ashford, subject to certain incumbrances which the grantee assumed. After the property was sold, falling short of realizing the amount of the incumbrances, a bill was filed to compel him to pay the balance. The court said he could not take the benefit of the deeds to him without also assuming the burdens. So, any one who invokes the authority of this building regulation to justify him entering his neighbor's premises and pulling down his wall, must take it subject to the condition annexed to that permission, which, in itself, is a perfectly reasonable condition. As a matter of fact also, the defendants in this case did accept the privilege with the condition, and did assume the duty which the building regulation purports to impose upon him. It appears from the testimony of Mr. Entwistle that when he gave the permit to pull down the north wall it was given with the notice that they would be required to make good all damages occasioned thereby to the adjoining owner. And, thereupon, the defendants, in making their contract with Kenderline and Paret, put in this provision:

"As the walls of the present building are to be taken down, the contractor is to shore up all joists, etc., *in the adjoining buildings, board up and make weather-tight the several stories of the buildings and space under roofs, and as soon as practicable after the new walls are up, plaster and restore all the work injured by taking down the walls and put it in as good condition as it was before the walls were removed.*"

To save themselves harmless, they make the contractor enter into that engagement, and the contractors did enter upon the lot of the plaintiff and undertake to shore up his building and restore it to its former condition, but the complaint is that he did not shore it up sufficiently and, in

consequence, it got out of plumb and was generally injured. So that the reasonable condition prescribed by this building regulation was recognized, assumed and accepted by the defendants themselves when they undertook to tear down the wall and when they made this contract with Kenderdine and Paret. It is not for them to say now that the condition was void when it is annexed to a privilege which they undertook to exercise.

The building regulation may reasonably receive still another reading. At common law, a party had no right to enter upon and take down this wall, and if he did so, he was liable to make good the damage. If this regulation had said nothing about damages, the question might have been made whether it intended to confer the privilege of taking down the wall without regard to the consequences to the neighbor; but, as it is expressed, it simply gives a privilege which did not exist at common law, but reserves the common law liability for the consequences. We are satisfied, therefore, that upon all the grounds—both on the ground that this building regulation prescribed a reasonable condition, and also because the building regulation may be entirely ignored and the defendants would still be under an obligation to make good the damages occasioned by this entry upon their neighbor's land, whether the justice at the trial based his opinion upon the common law duty or the duty prescribed by the building regulation—he was right.

The next important question in the case, is that relating to the subject of *independent contractors*. It is claimed that this work was not done by the defendants, Saks & Co., but done by Kenderdine and Paret, who were not *their agents* in the matter, but *independent contractors*. The distinction is very well understood between an agent and an independent contractor. I employ a man to do work for me—to build my house, for example—under my express directions as to all the details. He becomes my agent and I

become responsible for all injuries resulting to other people from his neglect; but if I am compelled to have work done which requires technical skill, and employ a man versed in that species of work, and trust the matter entirely to him, and contract with him simply for the result, and have no control whatever over the means and details of producing it, that man becomes an independent contractor, and I am not, as a general rule, responsible for injuries to other people through his negligence. That would be illustrated in this case by supposing somebody passing along the street where this building was in course of construction to be injured by falling bricks or timber through the negligence of the contractor. The owners of the building would not have been responsible in that case. There is no doubt at all that this was a case of independent contractor. These defendants had no skill in building. They never undertook to exercise any, but trusted it entirely to their contractors, Kenderdine and Paret.

But the rule itself has certain very proper and reasonable exceptions. These are expressed, perhaps as well as anywhere else, in Cooley on Torts, pages 547 and 548.

"In general" it is said, "it is entirely competent for one having any particular work to be performed to enter into agreement with an independent contractor to take charge of and do the whole work, employing his own assistants and being responsible only for the completion of the work as agreed. The exceptions to this statement are the following: He must not contract for that the necessary or probable effect of which would be to injure others, and he cannot, by any contract, relieve himself of duties resting upon him as an owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others. Observing these rules, he may make contracts, under which the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not of those of the em-

ployer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the contractor's negligence. In one case the following rules have been laid down: 1. If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury, but for the negligence of the contractor not done under the contract, but in violation of it, the employer is in general not liable. 2. If I employ a contractor to do a job of work for me, which in the progress of its execution obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury."

This question generally arises where a man is doing or causing work to be done on his own premises. But the present is a case where he has actually entered upon the premises of another man. It is hardly necessary to say that that kind of work is, necessarily and *per se*, a nuisance. In the first place, it causes inevitable temporary disarrangement and inconvenience; it imperils the safety of the adjoining building and very often results, as in the present case, in its permanent injury, and in a case of that kind it would seem to be extremely unjust that the building owner should get rid of his responsibility by contracting with somebody else to prosecute this work, especially as his contractor, although a reputable and skillful builder, may be pecuniarily irresponsible.

Then, another exception to the rule would be where a party is under an antecedent obligation to do a thing, or to do a thing in a particular way. In that case he cannot get rid of his responsibility by deputing it to somebody else. That principle is illustrated in the case of the Mayor of the City of Baltimore *vs.* O'Donnel, found in 53 Md. Rep., 110.

There a contractor had been employed to do certain work on one of the public streets. An excavation had been made but it was imperfectly protected and a person fell into it and was injured. The court of appeals say :

"The appellant contends that inasmuch as the work was being done by an independent contractor pursuing an employment wholly independent of the city, who was free to exercise his own judgment as to the mode of conducting the work and the assistants he was to employ, the rule of *respondeat superior* does not apply, and that the contractor alone is responsible, if any one is. In reply, the appellee admits that, ordinarily, as a condition precedent to holding the superior amenable, the relation of master and servant must be shown to exist, and that in the case of a contractor employing others to do the work, these sub-employees cannot be strictly regarded as servants of the city, but he insists that another rule applies which fixes the responsibility of the city in this case. That rule he insists is this: That where the person for whom the work to be done is under a pre-existing obligation to have the work done in a particular way or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor. The learned judge who decided the case below regarded the appellant as under such pre-existing obligation, and so instructed the jury, and it is that ruling we are asked to review."

And the court affirmed the ruling. It seems to me that case lays down a very clear principle. In this case, it was the duty of the defendants, either under the building regulations or the common law, to make good all damages occasioned by this building operation, and they could not get rid of that duty by employing a contractor to do the work.

This kind of case is distinguishable from those in which a man occasions an injury to a neighbor by work on his own premises, as by excavation. It seems to be pretty well

settled that a man has a right to support his own land by the adjoining land, and if his neighbor digs down his land so as to deprive him of that support, so that his land caves in, he has a right of action, although his neighbor may exercise all the care and skill he can. He is absolutely bound to make good the damages. But a man, unless in certain instances, as where he has a clear right by prescription or otherwise, has no right to the support for buildings that he loads his land with in that way. The law then requires that a man who excavates his own land, at the risk of his neighbor's buildings, must exercise proper care and skill; but, on the other hand, the authorities also hold that, even in that case, this duty of exercising care and skill cannot be deputed to a contractor, so as to relieve the owner of responsibility. Certain cases were cited in the argument to this effect, as the case of *Bower vs. Peak*, 1 Q. B. Div., 321, where it was held that where one ordered work, even on his own premises, which would naturally threaten injurious consequences to his neighbor; that is, pulling down a house and the excavation of land, he was bound to see to the doing of all that was necessary to prevent it and could not relieve himself from that responsibility by employing a contractor.

In *Tarry vs. Ashton*, in the same volume, it was held, that one keeping a lamp suspended in front of his house on a public highway was bound to keep it in a safe condition, and was not protected from the consequences of neglect by employing an independent contractor to attend to it.

In *Hughes vs. Percival*, in 8 App. Cas., 443, where the defendant took down his own house, in doing which his contractor cut into the party-wall between him and his neighbor—not even attempting to remove the party-wall—and thereby caused the builder's house to fall and drag down the plaintiff's house, it was held that the law cast the duty on the defendant to see that skill and care were exercised in the operation, and he could not avoid the consequences by delegating the performance to a third person.

If that rule operates where a man is building, on his own land, with how much more force ought it to obtain where he is actually invading his neighbor's land and temporarily destroying part of his property?

We, therefore, are satisfied that the general rule exonerating a party who employs an independent contractor, has no application at all to this case.

On looking at the instructions asked on the part of the defendants, it will be found that all of them, except the general instruction prayed for at the close of the evidence, "that the plaintiff is not entitled to recover," presented this same question in different forms. I will read a single one of the instructions to show the character of all. The third instruction:

"If the jury find from the evidence that the construction of the building mentioned in the declaration was done under the contract and specifications annexed thereto, given in evidence, and that the defendants neither furnished any of the material, machinery and labor employed in doing the work, nor exercised any control over it, either as to the mode or manner of doing it, and that the damage complained of was the result of negligence on the part of the contractors, Kenderdine and Paret, and the employees, between whom and the defendants, the court instructs the jury, the relation of master and servant did not exist, then the plaintiff is not entitled to recover in this action, and your verdict should be for the defendants." That is a sample of the instructions. They are all simply variations of that one form. There are one or two minor questions presented by instructions which were not pressed at the argument and which do not seem to call for any remark. On the whole, we think the ruling of the court at the trial term ought to be affirmed.

Mr. Justice JAMES said:

While concurring entirely in the conclusion reached, I prefer to base the liability of the defendants distinctly upon

the ground of the common law. I do not think I am ready to say that the makers of the building regulations can add to or vary the liability the party incurs at common law in doing an act. I think, also, that the defendants' liability may be based upon the ground that they assumed the liability by contract, for when they were informed of the terms of the building regulations, they substantially said, "Very well, we accept them, and will remove these walls on those terms, and will make good the damages, if there are any." I think the conclusion of the court may be rested on either of these two grounds, but am not prepared to say that in making a building regulation the Commissioners can *impose in invitum* the liability a man incurs, and say what he shall pay for injuring the property of another. It is only for the purpose of avoiding any contribution to that idea that I have said this much.

VIRGINIA ANN BENTER

vs.

JOHN PATCH AND JOSEPH PATCH.

1. Courts of equity do not weigh testimony by the number of the witnesses alone. Circumstances and known facts may often establish the truth more conclusively than the oaths of the parties or the written depositions.
2. A sale of real estate at a price so grossly inadequate as to shock the moral sense of any one to whom the facts are known will be set aside, especially where it is accompanied with evidence of fraud and misrepresentation.

In Equity. No. 10,604. Decided December 10, 1888.
The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree dismissing a bill filed to obtain the cancellation of a deed of real estate alleged to have been obtained for a grossly inadequate consideration, and by fraudulent misrepresentations.

THE FACTS are sufficiently stated in the opinion.

Messrs. FRANKLIN H. MACKEY and JOHN CRITCHER, JR.,
for complainant:

The consideration in this case was *grossly* inadequate, and comes fully within the characterization of Judge Story, when he says that between persons standing upon a *precisely equal footing* the inadequacy must be so great "that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." 1 Story, Eq. Jur., Sec. 346; *Alove vs. Jewell*, 94 U. S., 506.

In *Graffam vs. Burgess*, 117 *Id.*, 130, it is said:

"If, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner or party interested has been misled or *surprised*, the sale will be regarded as fraudulent and void."

So in *Kloepping vs. Stellmacher*, 21 N. J. Eq., 328, Chancellor Zabriske, conceding that mere inadequacy of price would not *alone* justify the setting aside of a sheriff's sale, says:

"But when such gross inadequacy is combined with fraud or mistake, *or any other ground of relief in equity*, it will incline the court strongly to afford relief. The sale in this case is a great oppression on the complainants. They are ignorant, stupid, perverse and poor. *They lose by it all their property and are ill fitted to acquire more.* They are such as this court should incline to protect notwithstanding perverseness."

A conveyance obtained for an inadequate consideration from one not conversant of his right, by one who had notice of such right, will be set aside, although no actual fraud or imposition be proved. 1 Sugd. on Vendors, 6 Am. Ed., 320; *Osgood vs. Franklin*, 2 John. Ch., 24; *Butler vs. Haskell*, 4 Desaus., 651; *Evans vs. Luellyn*, 3 Bro. C. C., 150.

Mr. FRED W. JONES for defendant:

The inadequacy in price must "be so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." Lord Thurlow in *Gwynne vs. Heaton*, 1 Bro. C. C., 8, and this has been followed by a multitude of decisions in nearly every State of this Union.

"And unless some fraud is perpetrated, or some unconscientious advantage is taken of the improvidence or distress of the vendor, or of the relations of confidence between the parties, inadequacy of price is insufficient to vitiate an executed contract." *Bailey vs. Litten*, 5 Ala. R., 282; *Dunn vs. Chambers*, 4 Barb., 379; *McCormick vs. Nalin*, 5 Blackford, 209. In *Erwin vs. Parham*, 12 How., 200, where one had for \$600 purchased mortgage notes calling in the aggregate for \$260,000, the court say: "The payer may have been insolvent, and the mortgage of no value for want of

title in the mortgagor. In such event no startling inadequacy of price could be predicated of the enormous disparity between the nominal amount of the rates and prices paid for them. Complainant is entitled to relief * * * certainly to the extent of the \$600 and interest on it."

In *Aiman vs. Stout*, the court say, "mental weakness will not authorize a court of equity to set aside an executed contract, unless it amount to inability to comprehend the contract, and unless accompanied by evidence of imposition or undue influence." 42 Pa., 114.

Here is an executed contract. "Both at law and equity, a person having power of disposition of property, and selling it for *any* purpose, cannot avoid the contract upon the mere ground of inadequacy of price." *Leach, V. C.*, in *Shelly vs. Nash*, 3 Madd., 235.

"The power of court to set aside executed contracts, on the ground of inadequacy of price, is a most delicate one, and should be applied with extreme caution. Mere inadequacy is not sufficient unless it be so gross as to shock the conscience. But when the contract is one of hazard, and whether it will be profitable or ruinous is dependent on future contingencies, the issue of which no human foresight can discover, the court has no standard to determine whether the price was or was not inadequate, much less whether it was so gross as to be evidence of fraud, and the court should refuse to interfere with the legal operation of the contract." *Vint vs. King*, 2 Am. Law Reg. (O. S.), 712.

"The court will not set aside a sale, &c., unless the fraud is manifested beyond a reasonable doubt, will not place conjecture for proof, nor suspicion for plain, direct and positive presumption." *Phetteplace vs. Sayles*, 4 Mason, 324.

An important decision, to which attention is specially invoked, is that of *Carlton vs. Rockport Ice Company*, decided in 1885, 78 Maine Rep., 49. There property worth \$1,000 was sold for \$50, but it was "in a bad way about taxes." The vendee succeeded by litigation costing several hun-

dred dollars in removing the tax encumbrances. Although untruthful representations concerning the property had been made to the vendors by defendants' agent, yet the bill to cancel and avoid the deed, filed by the vendors, was dismissed.

Mr. Justice MERRICK delivered the opinion of the Court.

This is a bill filed to vacate a conveyance alleged to have been improvidently made by the complainant to the defendants without due advice and knowledge, upon a grossly inadequate consideration, and under circumstances as alleged, of fraud and misrepresentation.

The complainant, a single lady of advanced age, resided in Alexandria, Va., her brother resided in Washington and died here, seized of lot 39, square 545, somewhere about the year 1862, during the turmoils and confusions of the civil war, and, as a consequence of that, and the circumstances connected with the nature and character of the property, which was in a neglected portion of the city, it remained unoccupied and neglected for many years. During this period, the lot being below the grade of the street, stagnant water is said to have collected upon it, and in course of time it became a nuisance, so that it was filled up by the authorities, and what is called a nuisance-tax was levied against it to the amount of \$203. The lot lay there abandoned and neglected, and apparently unknown for a great many years.

Another lot adjoining lot 39, and also inherited by the complainant from her deceased brother, was in exactly the same situation. It appears that a short time prior to the deed in question to the defendants, another party, having his eye upon a profitable adventure, went to the complainant, who was living in Alexandria, and represented to her that the property was worthless; that it was overburdened with taxes and had been sold therefor, and was of no value to her whatsoever, but that he would give her five dollars if

she would execute a deed of it to him. She was misled entirely by his statements as to the value of the property, and the circumstances connected with her title, and the legal force of the alleged tax liens upon it; and in the belief that it was of little or no value she was induced to transfer to him the lot for the nominal consideration of \$5.

The defendants in this case are brothers—one of them is a real estate title examiner. Learning of what had been done with this other lot, they went together to Alexandria to see this lady with reference to the lot in question. They called at her house and, one of them acting as spokesman, made similar representations to her, telling her that the property was “in a very bad way in regard to taxes,” and offering to give her \$5 for a deed for it. She was without counsel, without knowledge. A man knowing the value of the property approached her, took advantage manifestly, from the testimony, of her impressions, as derived from her previous communications with the purchaser of the other lot, and under those circumstances she executed a deed to them for this nominal consideration.

It appears that, in point of fact, the alleged nuisance tax upon the property was notoriously invalid and illegal, and that fact was well known to the defendants when they sought the deed from her.

It is said that inasmuch as the bill avers imposition and misrepresentation, and the answer denies these charges, it is a case where the testimony is balanced, and consequently the complainant cannot recover.

Courts of equity do not weigh testimony in that manner. Where the testimony on one side is to a certain effect, but the testimony on the other side is to the contrary effect, and there are no circumstances surrounding the transaction which reflect light upon it, of course, if the testimony is balanced, the complainant cannot prevail. But it happens in chancery causes, as in all other causes, that the truth is oftentimes much more conclusively established by circum-

stances and known facts than it can be by the testimony of the parties themselves or by the written depositions. That seems to have been the case in the present instance. Here was property circumstanced in the manner I have indicated. The party in whom the legal title rested knew nothing whatsoever about it. The party who sought the conveyance of it was an expert and knew everything about it. He took advantage of the delusion or ignorance (which is the same thing) which she was laboring under in regard to the subject matter. Nor did he abstain altogether from misrepresentation. By his own statement he admits that he stated to her that the property "was in a very bad way in regard to taxes," and this added to the delusion that already existed in the mind of the complainant, resulted in his getting from her for the sum of \$5 property which was worth anywhere between \$200 and \$500, a price so grossly inadequate as to shock the moral sense of any one to whom the facts are made known. The question is simply whether, in such a state of case, a court of chancery will afford relief? The rule is so plain on the subject that it is hardly necessary to refer to authorities. But as we have the authority of the Supreme Court of the United States in a very similar case, it is appropriate, perhaps, to refer to it. In the case of *Graffam vs. Burgess*, 117 U. S., referred to by counsel for complainant upon his argument and in his brief, it is said, at page 185:

"It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves, than to those who are fully able to do so. The driver of a team, seeing a child or a woman, or a person of known feeble intellect, in the street, is bound to exercise greater care and diligence to avoid doing them harm than would be obligatory if it was a grown and capable man. In dealing with a man whose rights, without his knowledge, but which by due diligence he might know, are passing away by lapse of time into another's

hands, the latter may, perhaps, justify himself in the eye of the law (though not in conscience) in observing a wary and crafty silence, so as to put his victim off his guard and bring him into his own power, whilst he would be perfectly inexcusable in taking such advantage of a woman, unskilled in business, and unused to the stratagems which are sometimes resorted to by unscrupulous persons."

After discussing the merits of the case and the general doctrines as to the inadequacy of any other relief except that afforded by a court of equity, this language is used with reference to fraudulent transactions, at page 192:

"From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property, or parties interested in it, have been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefitted by the sale to raise the presumption of fraud.

Again, at page 194 of the same case, the learned judge delivering the opinion quotes as follows:

Mr. Kerr, in his treatise on Fraud and Mistake, says: "Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction." Chancellor Desaussure in the case of *Butler vs. Haskell*, 4 Desaussure, 651, 697, on the same subject, says: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made for a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general, a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of

the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct."

Now, in the light of these authorities, laying down the law so entirely consistent with the instincts of a right conscience, and applying them to the situation of the parties in this case, to which I have briefly adverted, it is impossible to escape the conclusion that the transaction demands imperatively that a court of equity shall grant the relief prayed for by the plaintiff; which is accordingly done.

The decree below is reversed, and a decree will be entered in favor of the plaintiff, annulling this deed.

GEORGE S. PRINDLE

78.

ROBERT G. CAMPBELL.

1. Though this court sitting in General Term may grant a new trial on the ground that the verdict was contrary to the evidence, it will exercise that power with great caution, especially where the judge below was of the opinion that the verdict should not be disturbed and upon the points presented by the instruction there was evidence upon both sides.
2. An exception to the overruling of a demurrer to the plaintiff's evidence is waived by the defendant if he proceed to offer testimony instead of standing on his demurrer.
3. An exception to the admission of evidence cannot be sustained where it does not point out upon what ground the objection was made.
4. It is entirely within the discretion of the trial judge to admit evidence on the rebuttal which ought to have been offered in chief, and an exception will not lie to his ruling on that subject.
5. Evidence as to the value of plaintiff's business is admissible in an action to recover damages caused by plaintiff's sickness and inability to attend to the same through the fault of the defendant.
6. Where the trial below was fairly conducted and the law of the case was fully and substantially applied, the appellant obtaining the benefit of all the law to which he was entitled or which he sought to obtain, there can be no good reason for reversing the judgment for matters immaterial or upon mere refinements as to the terms in which propositions have been submitted to the jury.

At Law. No. 26,535. Decided March 24, 1890.
Justices HAGNER, COX and JAMES sitting.

MOTION by defendant for a new trial upon a bill of exceptions and case, in a suit to recover damages for alleged defect in plumbing done by defendant for the plaintiff at his dwelling house.

THE facts necessary to an understanding of the points decided appear in the opinion.

Mr. A. S. WORTHINGTON for complainant.

Messrs. A. G. RIDDLE and H. E. DAVIS for defendant.

Mr. Justice HAGNER delivered the opinion of the Court:

The plaintiff was the owner of a dwelling house in Le Droit Park, about 100 feet distant from Sixth street. The

dwelling was connected with the main Sixth street sewer by a supplemental sewer. At the southwest corner of the cellar the latter sewer was entered by the house sewer, which had its origin in the northeast corner of the cellar and ran diagonally under the floor to the southwest corner, where it entered the supplemental sewer. The plaintiff testified that before 1884, an arrangement existed by which the rain-water from the roof descended by a pipe to the level of the cellar ceiling; and thence, by a galvanized pipe, it was conducted across the cellar ceiling to the northeast corner, and there by a down pipe entered the house sewer; that about this time he became suspicious of the soundness of this galvanized pipe, and he employed the defendant, who is a plumber, to sever the connection between the rain-water spout and the house sewer; to conduct the rain-water to a well in the back yard by an iron pipe outside the house; and also to close effectively the former entrance by which the rain-water entered the house sewer. The defendant and his workmen broke the connection at the bottom of the rain-spout; laid the iron pipe to carry the rain-water to the well in the back yard; removed the galvanized pipe from the ceiling of the cellar, and took it away; and broke the connection of the rain-water spout with the house sewer in the northeast corner of the cellar, and undertook to close the entrance to the house sewer.

He further testified that he was anxious to superintend the entire work, but when he reached the house he found the work in the cellar had all been completed, and the earth replaced where the workmen said they had closed the entrance to the house sewer. Soon his family began to fall sick and he detected the smell of gas in the cellar. He communicated with the defendant on the subject; but made no complaint about the work in the northeast corner of the cellar because he supposed that job had been well done. He first thought the smell arose from some defect in the fixtures belonging to the illuminating gas; and he

had them examined. Finally, however, he became apprehensive there was something wrong about the sewer, and he arranged with the defendant to put a running trap outside of the house. This work, however, was put off to suit the defendant's convenience. The sickness continued and finally one of his children died of diphtheria, and his wife and children, and he himself, were ill with the same symptoms. Unwilling to wait longer, he sent for Hannan, another plumber, who examined the gas arrangements and found nothing wrong there; and he engaged to come on the 9th of October to examine the sewer connections and do whatever was essential to rectify the evil.

The night before Hannan was to come the plaintiff went down in the cellar communicating with the furnace cellar, which he frequently entered to attend to the furnace, carrying with him a strong liquid disinfectant. Although he had no idea there was anything wrong about the connection at the northeast corner, he thought the soil there might possibly be impregnated with sewer gas from former leakages, and to remedy that possible danger he poured the liquid down in the corner on the asphalt, and stepped back, thinking it might splash on him; but to his surprise it all disappeared with a gurgling sound, showing there was an opening there. When Hannan came he communicated the fact to him. Hannan then made an excavation and found the opening where the rain-spout had entered the house sewer had not been properly stopped up, and that it was then open, and, on examining the side of the pipe next to the wall, he found a V-shaped piece broken out, about 2 inches wide at the top and running downwards to 4 inches in width. As soon as they applied their olfactories to the point they became convinced that was the source of the trouble. Hannan took up all the bad work and sealed up the opening properly. All this work was completed on the 9th of October, but the running trap into the outer sewer was not put in place until the 10th of October.

He further testified that from the time the opening was sealed up by Hannan and the gravel and concrete had been replaced in the northeast corner all smell of sewer gas ceased; and since that time there has been no further trouble from sewer gas in the house. From that time forth his family improved in health, although he himself had not entirely recovered. The plaintiff brought this action to recover damages for the injury sustained by himself and family from the unskillful work performed by the servants of the defendant in failing to close properly the opening into the house sewer, which formerly admitted the galvanized pipe.

There was a good deal of evidence on the other side disputing many of these points. In the first place, the defendant denied that he was employed to close that opening at all, or that his workmen attempted to close it; and he showed his bill, which referred apparently to outside work and not to work in the house. Next, he insisted that the sewer gas did not proceed necessarily from that opening, since there were several other defects in the original arrangement of the sewers, either of which might equally well explain the presence of gas. First, that it was a gross defect that no running trap had been placed outside of the house to prevent the regurgitation of sewer gas or odors from the town sewer into the house. Next, that the drainage pipes from the rear kitchen and from the water closets came down to the cellar and there entered the house sewer, and that between these pipes and the southwest corner of the cellar there was what is called a bell-trap opening into the cellar, which was very imperfect, and would allow the escape of odors when not filled with water; and it was in proof that at one time, at least when Hannan went there, there was no water in it; and he claimed that either of these defects was more likely to cause the escape of gas than the broken pipe.

The plaintiff offered one prayer, which was granted. The

defendant offered eight. The court refused the first seven, and granted the last one in these words:

"The jury is instructed that in order to entitle the plaintiff to a verdict the jury must be satisfied from the evidence—first, that the work complained of in the declaration and specified in the evidence as the alleged cause of damage complained of, was part of the work undertaken by the defendant; secondly, that such work was in fact defectively done; thirdly, that by reason of such defectiveness in the work, and such alone, the vapors and gases complained of escaped into the dwelling house of the plaintiff; and lastly, that such vapors and gases were the exclusive cause of the several illnesses and ailments of the plaintiff and his family, alleged in the declaration, or some of them."

This was a most exhaustive statement of the requirements of the situation, and would seem to have been all that the defendant could possibly ask. The jury having found a verdict for the plaintiff, we are asked to reverse and grant a new trial upon the ground that the verdict was not justified by the evidence. We have the right to adopt this course under the decision of the Supreme Court in the case of *Moore vs. Metropolitan Railroad Company*; but that court laid down the rule which this court has applied in *Fisher vs. Hume*, 6 Mackey, 9, that although this power exists, it is one which will be exercised with great caution; where the judge below, who heard all the testimony, saw the witnesses and observed their demeanor and was thus better able to judge of their intelligence and bearing, and heard the arguments, was of the opinion that the jury was justified in the verdict. Whenever the appellate court sees there were assumptions of facts in an instruction, not justified by the proof, it should exercise this power. But upon each of the points presented by the instruction there was evidence on both sides. The eighth prayer left it to the jury to decide, first, whether the work complained of and specified in the evidence as the alleged cause of damage, was a

part of the work undertaken by the defendant. Although this was denied by the defendant, yet Herbert, his paid servant, who never was employed by the plaintiff, testified that he took down the galvanized pipes in the house and actually undertook to close the opening into the house sewer in the cellar. Indeed, upon all the proof, there can be no doubt the jury were fully justified in finding, what seems certainly most reasonable, that the defendant was employed by the plaintiff to do this very work; and that his servant undertook to do it. That the plaintiff should deliberately have left such a hole unclosed is inconceivable.

Second, the jury was required to find that the work was, in fact, defectively done. There was certainly evidence to that effect. The large piece in the connecting pipe had evidently been broken out by Herbert's carelessness, and the top of the pipe was not even closed. The third essential to a recovery, as laid down in the instruction, was that the jury should find that by reason of such defectiveness in the work, and that alone, the vapors and gases complained of escaped into the dwelling house of the plaintiff. The defendant's counsel argued before the jury, as they did here, that there were several other causes which might equally well have accounted for the escape of the sewer gas. The jury, who were required to consider both theories, took a different view of the probable cause from that maintained by the defendant, and there was evidence to justify this conclusion. Lastly, the jury was required to determine before they could find for the plaintiff "that such vapors and gases were the exclusive cause of the several illnesses and ailments of the plaintiff and his family." The jury found such was the case, and we cannot hesitate to say there was testimony to support that finding. It is, therefore, clear this is not a case where we could undertake to set aside the verdict on the ground of insufficient evidence.

We have examined the seven preceding prayers and are very well satisfied the court was right in rejecting them all.

The first four relate to the form of the pleading, as do the reasons assigned in support of the motion in arrest of judgment. They present the objection that the declaration does not, in either count, sufficiently state a contract between the plaintiff and defendant. We are satisfied this is a mistake, and that the declaration sufficiently makes such a statement in each count.

After the plaintiff had closed his case in chief the defendant moved the court to instruct the jury that the plaintiff was not entitled to recover upon the evidence thus adduced ; and that instruction was refused. The defendant then proceeded to offer his evidence. The propriety of that refusal has been argued here. We are satisfied the point cannot be considered in this court under the circumstances. This has been decided by this court, and by the Supreme Court in *The Insurance Company against Crandal*, in 120 U. S., where the facts were very much like those in the present case. There, after the plaintiff had rested his case, the defendant asked the court to take the case from the jury, and the motion was refused. The defendant then introduced his evidence and the verdict being against him, he attempted in the Supreme Court to take advantage of the alleged error of the trial court in not granting the prayer at the time it was made ; but the Supreme Court refused to consider the objection, holding it had been waived by the defendant when he decided to proceed with his testimony, instead of standing on his demurrer to the plaintiff's evidence. There is nothing in the remaining prayers requiring special notice ; and it is sufficient to say they were all properly refused.

There were several objections to the rulings of the court as to the evidence. The first is to this statement of the plaintiff on redirect examination. "When he discovered this opening in the terra-cotta pipe he came to the conclusion that it was a sufficient cause to account for all the sickness that they had had in his family." The difficulty

here is that the exception does not point out upon what ground the objection was made. The courts have uniformly held that an exception taken to a mass of evidence without specifying the ground on which the objection is based, will not be examined by the appellate court; and in such case, if it appear the testimony is admissible for any purpose, its admission by the court will be considered proper. The Supreme Court uses this language in considering such an exception: (3 How., 530.) "With regard to the manner and the import of this objection, we would remark that they were of a kind that should not have been tolerated in the court below pending. Upon the offer of testimony, written or oral, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception, which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, the trial of the issue before the jury, that the court should explore the entire mass of evidence for the ascertainment of defects, which the objector himself either would not or could not point to their view." We applied this rule in *Woodbury vs. District of Columbia*, 5 Mackey, 134.

Some of these exceptions are based upon the allegation that the court allowed the plaintiff to introduce evidence by way of rebuttal which ought to have been introduced in chief. The settled rule on that point is that the admissibility of such evidence is entirely a matter of discretion in the court. In *Bannon vs. Warfield*, 42 Md., 39, after the defendant had closed, the plaintiff produced additional evidence, which was objected to upon the ground that it should have been offered in chief, but the court overruled the objection, and admitted the evidence. Then the defendant offered further evidence, which the court refused to admit, upon the ground that it should have been offered in chief. The defendant excepted to both rulings, contending that the plaintiff should not have been allowed to introduce his supplemental

evidence, but that since he had been permitted to do so, the same privilege should have been allowed to the defendant. The appellate court held that each ruling stood upon its own circumstances, and that the entire subject was in the discretion of the court, and its decision in such cases was not a matter of appeal.

The two exceptions to the testimony in behalf of the plaintiff as to the value of his business before he was taken ill, and its diminution after his illness, present general objections to a large mass of testimony, some parts of which were certainly free from all objection. Since the exception does not point out the particular part objected to, the ruling must stand, under the rule announced above in 3 Howard. Indeed we see nothing objectionable in any part of the offer. The objection to the testimony as to the value of plaintiff's business before his illness was properly overruled. We so decided in *Woodbury vs. District of Columbia* in 5 Mackey. There a physician sued for damages resulting from falling down an unprotected opening in a pavement, and he was permitted to prove that he had a large practice, and its value, and, furthermore, that he was a contributor to magazines and had lost seriously by being incapacitated from continuing that work.

The last exception was to the admission of the testimony of Cornelia Lucas, who stated that she knew the custom of the plaintiff was to keep the bell-trap in the cellar supplied with water, and when the plaintiff himself did not supply the water it was her duty to do so, and she saw to it herself. It was insisted, first, that this testimony should have been offered in chief, and further that it would not have been admissible evidence at any stage of the case. We are of opinion it was admissible, and the question whether it should be introduced in chief was solely in the discretion of the trial justice.

On the whole case we are persuaded, after full examination, that justice was done; and there is no ground of rever-

sal. The following language used in *Bannon vs. Warfield* seems to be worthy of notice. There the appellant had offered prayers which had not been granted by the court below, and although the court held some of the rulings below were wrong, yet they said:

“The party appealing should, in all cases, be able to show from the record that he has sustained real injury by reason of the rulings of the court below, which form the ground of the appeal, and where this court can see that the trial below was fairly conducted and that the law of the case was fully and substantially applied, the appellant obtaining the benefit of all the law to which he was entitled or which he sought to obtain, there can be no good reason for reversing the judgment for matters immaterial or upon mere refinements as to the terms in which propositions have been submitted to the jury. To justify a reversal there must be a substantial error apparent, and that to the prejudice of the defendant. If instructions be ambiguous or susceptible of different interpretations, the party liable to be affected by them should avail himself of the right to have that which may be doubtful made clear and certain by more explicit instruction.”

The judgment below is affirmed.

JAMES JACKSON, JR.,

EMMA M. COMBS AND COLUMBUS ALEXANDER.

1. Under an agreement to pay a sum of money out of the proceeds of a claim of the promisor against the United States as soon as the same shall be collected, there is no legal obligation on the part of the promisor to make known to the promisee the fact of the collection of the fund, and his failure to do so will not prevent the running of the Statute of Limitations from the date of its collection.
2. In such a case the rule is that unless by virtue of the contract itself, or some relation of the parties, the defendant is under a duty to make known the fact of payment, mere silence amounting to nothing more than non-action is not such a fraud upon the plaintiff as entitles him to complain of it; but it *seems* it would be otherwise if he were guilty of any act the tendency of which would be to deceive the plaintiff.

In Equity. No. 8348. Decided October 15, 1898.

The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

APPEAL from a decree of the special term dismissing a bill filed to procure the sale of a decedent's realty to satisfy an alleged indebtedness, the personalty being insufficient to pay the same.

THE FACTS are stated in the opinion.

Mr. F. E. ALEXANDER for plaintiff.

Messrs. NATHANIEL WILSON and ROBERT CHRISTY for defendants.

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

From the bill of complaint it appears that one Joseph Combs, having a claim amounting to \$82,000 against the United States, growing out of a seizure by the Government, in 1863, of a steamer of which he was the owner, employed one William Fitch, a claim agent at Washington, to collect the claim. The contract of employment was prepared in

writing by J. M. Yznaga, the stepson and attorney of Combs.

This contract, which was limited in time, expired by its own limitation. Thereupon another contract, unlimited as to time, was entered into between Combs and Fitch on the 31st of January, 1868.

The agreement was also prepared and put in writing by Combs' attorney and stepson, J. M. Yznaga.

The plaintiff avers that Fitch spent considerable time and money in the preparation of papers and prosecution of the claim against the Government, but that in June, 1868, he, Fitch, at the earnest solicitation of Combs and his friends, consented to relinquish this contract, in consideration that Combs, with one S. G. Cabell, should agree to pay him \$1,000 out of the proceeds of this claim when collected. Accordingly the contract between Combs and Fitch was rescinded, and Combs with Cabell executed to Fitch an agreement, as follows:

"\$1,000.

WASHINGTON, D. C., *June 18, 1868.*

"For value received in services rendered and a further consideration of giving up the contract between Joseph Combs and William Fitch for collecting a claim against the United States Government for the steamboat Louisville, we jointly and severally, or either of us, promise to pay to William Fitch, or his order, the sum of one thousand dollars out of the money, as soon as collected from the Government of the United States, on said claim for said steamboat Louisville.

"JOS. COMBS.

"S. G. CABELL."

The bill shows that Combs died in the city of Washington, on May 10, 1879; that he was intestate as to personal property, but testate as to real property; that he devised certain real estate in the city of Washington to his wife, Emma M. Combs, in fee simple. That Columbus Alexander was appointed administrator of the personal estate of

Joseph Combs, and that he executed, for a valuable consideration, an assignment of this instrument to James Jackson, jr., the plaintiff, on the 26th of April, 1881, some two years after the death of Combs.

The bill further alleges that Combs, in his life-time, collected the claim of \$82,000 from the Government of the United States; that it was paid to him on January 27, 1871; but that the first information had by the plaintiff of its payment was derived from a newspaper paragraph, in the city of Washington, on or about April 8, 1882. The averment is made that Fitch used all proper means to ascertain as to the collection of said claim, and it is charged that Combs and Cabell, and the defendant, Emma M. Combs, and the said Yznaga, well knew about the collection of said claim, and that the knowledge of its collection was fraudulently concealed from the plaintiff and said Fitch by said named parties, with intent to avoid or escape, if possible, the payment of the money due under the agreement, and with the intention or hope that, by permitting a sufficient time to elapse, the Statute of Limitations might be pleaded in any suit brought to enforce said agreement.

The plaintiff avers that Combs, as soon as he collected this claim, became, by virtue of the contract between Combs and Fitch, the trustee of the plaintiff, and that it was the duty of Combs to make known the payment of the claim and to pay to Fitch or his order the \$1,000 out of that sum. He charges that no part of it has been paid. That the personal estate is insufficient to pay it, and that there is due him the sum of \$1,000, with interest from January 27, 1871, the day of payment to Combs of the \$82,000, and he therefore prays that the realty in the possession of Mrs. Combs may be subjected to the payment thereof.

The issue presented to the court is raised by the answer of the defendant, Emma M. Combs, the only part of which necessary to be considered is as follows:

“In further answer this defendant says that she is in-

formed and believes, and therefore charges, that plaintiff is the son-in-law of said Fitch, and that said written obligation was transferred to said Jackson without any consideration being paid therefor; that said claim described in said bill of complaint is stale, unjust and inequitable, and that the said supposed cause of action described in said bill did not accrue to plaintiff at any time within three years before the commencement of this suit."

The answer denies all charges of fraud.

Evidence was taken by the parties on the issue joined between them, relating principally to the question of the Statute of Limitations and the question made by the plaintiff in his bill: that the payment of this money to Combs by the Government was fraudulently concealed from Fitch, so that for more than three years after the death of Combs Fitch was in ignorance of the fact of payment.

Counsel for the plaintiff, in his argument, while disclaiming that he is entitled to recover this money from the defendant upon the ground that Combs was constituted by this agreement a trustee, and that the money collected by him was a trust fund, yet claims that the relation of trust, nevertheless, did exist, and that for the purpose of preventing the Statute of Limitations running against this claim, the court should hold that such trust relation bound the obligors and their representatives to make disclosure of the payment of the claim.

In our opinion, however, this instrument was nothing more than an ordinary agreement binding Combs to the payment of \$1,000 out of this fund when collected. It did not create the relation of trustee and *cestui que trust* between these parties, nor did it impose any condition upon Combs in relation to the matter different from that of an ordinary debtor. While he had no right to use any artifice to conceal from Fitch the fact of the payment of this money, it was not his duty to seek Fitch to inform him that it was paid.

The money was collected from the Navy Department of the United States, so far as we are advised by the record, in the usual mode in which such claims are collected. There is no proof that inquiry was ever made of Combs during his life-time as to whether the money had been paid; nor is there any proof that Combs ever used any artifice whatever to conceal the fact of payment from Fitch, or that there was any fraudulent concealment of the fact of payment by either Mrs. Combs or Cabell or Mr. Yznaga, who was the attorney of Combs during his life-time. In fact, the evidence shows that none of these parties except Combs knew anything about the payment of this money at an earlier date than Fitch and the plaintiff. It appears from the evidence that Combs himself, after the payment of this money and until the time of his death, was most, if not all of the time, absent from the city of Washington, and it does not appear that any inquiry was made of him as to whether he had collected this money or not. Fitch could easily have put Combs in such a position that his concealment of the fact would have been fraudulent, by addressing to him an inquiry on the subject. A refusal to answer, or false information, would have taken the case out of the statute. It is in evidence that Mr. Cabell, a short time after the payment of this money, went to Fitch and sought to take up this paper by offering him 10 cents on the dollar for it; which sum Fitch refused to receive; but all the evidence is to the effect that Cabell did not then know that the money was collected, and did not afterwards, until he saw the article in the newspaper referred to in the bill.

Our attention has been called by counsel for the plaintiff to several cases supposed to be in point, but upon examination of them we find that they are all to the effect that where an action is brought against a party for the *commission* of fraud, the statute will not run, even though the defendant has not been guilty of any active efforts to conceal the cause of action, but that the action may be maintained

for the fraud at any time within the statutory period after its discovery by the plaintiff, the only qualification being that the plaintiff should have exercised reasonable diligence under the circumstances to discover the fraud. But that is very different from the case at bar. This is in effect simply an action to recover upon the contract. The Statute of Limitations having been pleaded, it is replied that the defendant fraudulently concealed the fact that the cause of action had accrued. This is not the exact form, but is the legal effect of the issue as presented. Under such circumstances the rule of law is that, unless by virtue of the contract itself or by some relation of the parties, the defendant was under a duty to make known the fact of payment, the defendant's mere silence amounting to nothing more than non-action, is not such a fraud upon the plaintiff as entitles him to complain. There was no duty resting on Combs to seek Fitch to make the fact known that he had collected this money, and he was guilty of no active fraud, nor of any act the tendency of which would be to deceive, but merely, as far as the evidence shows, maintained silence upon the subject.

The decree of the court in special term is affirmed and the bill dismissed.

POWELL M. BRADLEY ET AL.

vs.

WILLIAM M. GALT AND ROBERT C. HEWETT.*

On an appeal from this court to the Supreme Court of the United States after a supersedeas bond has been accepted either in court or by a justice, the jurisdiction of this court and the power of the justice over the subject becomes exhausted. Consequently any subsequent order increasing the penalty of the bond is a nullity.

At Law. No. 23,562. Decided November 29, 1886.

THE CHIEF JUSTICE and Justices COX and MERRICK sitting.

MOTION by defendants for a new trial on a bill of exceptions in an action on an appeal bond.

THE CASE is stated in the opinion.

MESSRS. W. D. DAVIDGE, A. C. BRADLEY and REGINALD FENDALL for plaintiffs.

MESSRS. W. F. MATTINGLY and W. A. COOK for defendants.

Mr. Justice COX delivered the opinion of the Court:

This is an action on an appeal bond executed by the defendants, with Mark Young as principal, given in the case of Bradley and others against Mark Young and others, in case No. 3153, in equity.

In that case a decree was rendered on the 19th day of June, 1877, against the defendant, Mark Young, for the payment of a sum of money exceeding \$10,000, and also giving other relief specifically. On the 20th of July, 1877, after the expiration of the term, a supersedeas bond, conditioned in the usual form of supersedeas bonds, to answer all damages as well as costs, was tendered to Mr. Justice Humphreys, executed by Mark Young and Abraham H. Herr, in a penalty of \$5,000, which bond was ap-

* This case and one or two others inserted at the close of this volume were unavoidably omitted from the previous volume of Reports where they should have appeared.—REPORTER.

proved, and was filed on the 20th of July, 1877. On the 24th of July, 1877, notice was given of a motion to vacate the approval of this bond, and on the next day Mr. Justice Humphreys, at chambers, passed the following order:

“Ordered, this 25th day of July, 1877, that the penalty of the appeal bond in this case be increased to \$20,000 within ten days from the date hereof.”

The bond upon which this suit was brought was then executed under this order of Mr. Justice Humphreys, in the additional sum of \$15,000, and purported to be signed and executed by Mark Young, R. C. Hewett, S. C. McDowell, and W. M. Galt, and on the 1st of August, 1877, it was approved by Mr. Justice Humphreys and filed.

The original case went to the Supreme Court, and the defendant, Young, failing to prosecute his appeal with effect, this action was brought against two of the sureties, it turning out that one of them, McDowell, never, in fact, signed the bond, and that his signature was either forged or put there without authority.

There are several defenses to the action.

One is that after the first appeal bond was approved and filed, the powers of the justice over this subject had been exhausted, as the case had then been transferred by appeal to the Supreme Court, and was thenceforth within the jurisdiction of that court, and any proceedings in the court below, or by a justice at chambers, was a mere nullity, and consequently the bond itself is inoperative and void.

In order to appreciate this defense, it becomes necessary to ascertain in what stage of the case it is transferred by appeal to the Supreme Court, so that that court can determine any question thereafter arising, especially such a question as the sufficiency of an appeal bond which results in supersedeas of the decree rendered below. As this is a question of practice, we are to consult the decisions of the Supreme Court on this subject. Going back to 16 Howard, at page 135, we find the case of Stafford against the Union

Bank of Louisiana. In that case, an appeal was taken from a decree of the District Court of Texas, pending a term of the Supreme Court. The district judge had taken an insufficient bond. In the court below a motion had been made to dismiss the allowance of appeal, because the security was insufficient for a supersedeas. The motion in the Supreme Court was first for a *procelendo* commanding the district judge to execute the decree, and also to dismiss the appeal. The Supreme Court overruled both of these motions, but suggested, as a proper remedy for the difficulty, a mandamus to the judge below, to be applied for on motion, commanding him to execute the decree. A mandamus was applied for and that came before the court in the same case in 17 Howard, 275. A mandamus was issued to the district judge, and he made a return, that as he had taken a bond, etc., the case was removed from his court, and he had no longer jurisdiction to make any order in the cause. The Supreme Court says:

“It was the duty of the judge in allowing the appeal, to take security on the appeal in the sum decreed, and not having done so, the appellant was not entitled to a supersedeas of any process necessary to carry the decree into effect, and the judge was bound to issue it on the application of the plaintiff. The court, therefore, order that a peremptory mandamus issue commanding the judge forthwith to carry the decree into effect.”

It will be observed here that the court do not intimate that upon the failure of the judge to take a proper appeal bond in the first instance, a further application should be made to him to order a new bond, but they themselves undertake to direct the execution of the decree in default of a proper supersedeas bond.

In the case of *Ex parte Milwaukee Railroad Co.*, 5 Wallace, 188, a decree was rendered for the sale of mortgaged property. An appeal was prayed and allowed. The district judge below, however, refused to approve the bond

tendered to him, the sureties of which were not residents; so that the only proceeding in the case, and the one brought to the Supreme Court was the appeal and the allowance. Then a motion was made to the Supreme Court for a mandamus to compel the district judge to approve the bond and allow a supersedeas. The court in that case said:

"This case being properly in this court by appeal (there being nothing but the appeal and the allowance), we have a right to issue any writ necessary to render our appellate jurisdiction effectual."

Thereupon, doubting whether they had a right to issue a mandamus, and thereby control the discretion of the district judge as to approving the bond, they ordered a supersedeas on the filing of a proper bond within thirty days.

The next case to be referred to is that of the Rubber Company against Goodyear, in 6 Wallace, at page 156. In that case a motion was made to reduce the penalty of an appeal bond. The court says:

"In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. The question of the sufficiency (of the appeal bond) must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here."

In the case of Edmonston vs. Bloomshire, in 7 Wall., 306, the appeal was not followed up by filing the record at the term to which it was prayed, and it being filed at a subsequent term, the court, of its own motion, dismissed the appeal for want of jurisdiction, and said:

"The prayer for appeal and the order allowing it constituted a valid appeal. The bond was not essential. It could have been given here. The bond may be given with effect while the appeal is alive."

Of course every appeal expires with the term to which it is prayed.

The next case is found in 12 Wallace, 86, that of French

vs. Shoemaker. That was a case of a motion to dismiss an appeal because the bond was insufficient to operate as a supersedeas, and on the other hand a motion was made for a supersedeas. The court says:

“What is necessary is, that it (the bond) be sufficient and, when it is desired to make the appeal a supersedeas, that it be filed within ten days from the rendering of the decree, and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, that question, as well as every other in the cause, becomes cognizable here. It is, therefore, matter of discretion with the court (here) to increase or diminish the amount of the bond and to require additional securities or otherwise as justice may require.”

It has been urged in argument that the citation of the judge below is necessary to transfer the case to the Supreme Court so as to give it jurisdiction over further proceedings in the case. Some language rather looking in that direction was used by the court in one or two cases. In the case of *Sage vs. Railroad Co.*, 96 United States Reports, 712, a supersedeas writ had been rejected by the court below, but bonds were afterwards approved in vacation. A motion was made in the Supreme Court to vacate the supersedeas. There the court said:

“Whenever security for an appeal is accepted during the term, an appeal is allowed. If the security is taken out of court, a citation should be issued to bring in the parties, unless they appear voluntarily; for until the security is accepted the allowance of the appeal cannot be said to have been perfected. Whoever can sign a citation may allow an appeal.”

In the case of the *National Bank vs. Omaha*, in the same volume, at page 737, the court says:

“We have decided in *Sage vs. Railroad Company* that if the security is not taken until after the term, a citation should be issued.”

These cases are explained and the proposition apparently approved is modified in subsequent cases. Thus, in the case of *Peugh vs. Davis*, 110 United States, page 227, it appears that a decree had been rendered on the 30th of October, 1882. An appeal was prayed and allowed but no bond was filed until May, 1883, and then Mr. Justice Miller granted a supersedeas, took security and signed a citation. In the Supreme Court a motion was made to vacate the supersedeas because no appeal was perfected in sixty days, and the court said :

"In *Edmonston vs. Bloomshire*, 7 Wallace, it was decided that a prayer for an appeal made in open court and an order allowing it constituted a valid appeal. Under such circumstance *it becomes the judicial act of the court in session, and the bond is not essential to the taking of the appeal* though it may be to its prosecution.

"We decided in *Railroad Company vs. Blair*, 100 U. S., that if an appeal was allowed during the term at which the decree was entered, and the bond not executed until after the term, a citation was necessary ; but that related only to procedure under the appeal and is not in conflict with former decisions as to the effect of an allowance of an appeal by the judicial act of the court in session."

Again, in *Dodge vs. Knowles*, 114 U. S., 430, 438, where it appeared that the final decree was rendered on February 23, 1881, and appeal was prayed and allowed and security was not taken until November, 1881—after the expiration of the term—and there was no citation at all, but the appeal was docketed in the Supreme Court on November 11, 1881, and a motion was made to dismiss the appeal, the court said :

"The allowance of the appeal by the court in session at the term at which the decree was made, constituted a valid appeal of which the appellee was bound to take notice. The docketing of the cause in time perfected the jurisdiction of the Supreme Court. The giving of a bond was not

essential to the taking though it was to the due prosecution of the appeal. It was furnished and accepted before the docketing. Had this not been done, leave would have been given to the appellant to supply the omission before dismissing the appeal, as decreed in *Peugh vs. Davis*, 110 U. S."

It has also been decided that if an appeal was allowed in open court during the term of the decree, a citation was required as a matter of procedure, if the security was not furnished until after the term. But in *Railroad Co. vs. Blair*, 100 U. S., 662, it was said: "Still an appeal, otherwise regular, would not probably be dismissed absolutely for want of a citation if it appeared that the allowance was made in open court at the proper term, and the appellee had notice of what had been done. The citation is intended as a notice. The judicial allowance of an appeal in open court is notice sufficient of the taking of the appeal, and the security is only for due prosecution. If it is taken out of court, citation is necessary *only to show that an appeal allowed in term has not been abandoned by the failure to furnish security. It is not jurisdictional.* If by accident it is omitted, the motion to dismiss is not granted until opportunity is given to give the requisite notice. Here, before final hearing, notice was given to the appellee of the appeal by order of the Supreme Court, and that re-argument was desired," &c.

The same language, in substance, is repeated in the case of *Hewitt against Filbert*, in 116 United States Reports.

The summing up under this head is:

First. The allowance of the appeal makes it a valid one, and the appellate jurisdiction of the Supreme Court attaches upon said allowance.

Second. A citation is not necessary to such jurisdiction where the appeal is prayed in open court.

Third. Even a bond is not necessary to the jurisdiction.

Fourth. The court or judge in vacation who accepts the security must determine on its sufficiency in the first instance, but after he has once done so, this question, and

any other that may arise, is cognizable in the Supreme Court.

Fifth. A bond which is not sufficient for a supersedeas is nevertheless sufficient to sustain the appeal and prevent its dismissal, so as to leave the case within the jurisdiction of the appellate court.

The question then arises, was the jurisdiction of the Supreme Court over the question of sufficiency exclusive? The authorities to which I have referred have said that the question was cognizable in the Supreme Court after the appeal was made and was allowed. We can conceive a case to be in the Supreme Court and in this court too, at the same time, for different purposes. It may be in the Supreme Court for the purpose of hearing an appeal from a decree which is not superseded by the appeal, and at the same time here for the purpose of executing the decree. But we cannot conceive a case to be made there and here at the same time for the same purpose, so that each court may determine the same question, because if each court may determine the same question it may execute its own decree, and they might execute conflicting decrees, which would be absurd. Whenever the point is reached that the Supreme Court has power to determine a question like this, then its power must be exclusive, and this seems to be held in the case of *Draper vs. Davis*, 102 United States, 370.

There an appeal was prayed and allowed, and a bond in the sum of \$1,000 was approved as a supersedeas bond, and the citation was signed by one judge. The same judge afterwards becoming satisfied that the bond was insufficient, ordered an additional bond to be filed in penalty of \$3,000, and such a bond was tendered to him and refused. Thereupon a motion was made in the Supreme Court for a supersedeas. The court said :

“ When the original bond of one thousand dollars was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a supersedeas.

That transferred the jurisdiction of the suit appealed to this court. The power of the justice over the appeal and the security was exhausted, in the absence of fraud, when he took the security and signed the citation. From that time the control of the supersedeas, as well as the appeal, was transferred to this court."

Now, in the present case, the bond tendered in the sum of \$5,000 was tendered as a supersedeas bond. It was approved and executed as such, and that constituted an allowance of a supersedeas by a judge, which arrested all further proceedings in the way of executing the decree until at least that proceeding should be reversed by appropriate judicial action. The only difference between that case and this is that there the judge had signed a citation, but, as I have already shown by the later case, the signing of the citation was entirely unnecessary to the jurisdiction of the appellate court, but was merely a matter of procedure to bring the parties in.

A somewhat similar question was decided in the case of *Keyser vs. Farr*, in 105 United States, 265. There the appeal was allowed, and the bond fixed and the record filed in the Supreme Court during the same term. Afterwards a motion was made in the court below for further security, and a motion made in the Supreme Court to restrain the court below. The court says:

"After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court."

They had previously decided, in *Goddard vs. Ordway*, 161 United States, 745, that the court below might, at the same term at which the appeal was allowed, vacate the allowance, but they said in this case, the record having been carried up, then that power was gone, and the court below had exhausted its jurisdiction. They did recognize, as I have stated, the power of the court below to vacate a supersedeas

during the same term at which it had been allowed, but they never recognized the power of a judge at chambers to vacate a supersedeas once allowed, either by the court or by himself.

Now, therefore, according to the clear ruling of the Supreme Court, after a supersedeas bond has been tendered or accepted, either in court or by a justice, the jurisdiction of the court has expired, and the power of the justice over that subject is entirely exhausted, and no motion can be made except to the Supreme Court with reference to the sufficiency of a supersedeas bond.

It has been suggested, however, that although the justice had no jurisdiction over this subject, the bond which was tendered by the defendants might be treated as a voluntary bond, an obligation which they voluntarily assumed, and which was none the less binding upon them; and the case has been likened to those cases in the books in which parties about to enter upon the duties of a public office are required to give bond, although the statute did not require any bond at all to be given. Such bonds have been held as binding, notwithstanding the omission of the law to require them to be given. There was such a case reported in 5 Peters. The language of the court there was, that it was incident to the powers that devolve upon the Department by law, to exact bonds from officers charged with the custody of public funds of the United States, or having them specially in their custody, and there is no objection to them legally or morally, and the defendants, therefore, were held bound by such bond, notwithstanding the fact that no law provided for them.

The difficulty in this case is that, according to the ruling of the Supreme Court, the justice here had no jurisdiction at all.

He had no right either to order or accept, or order to be filed, a supersedeas bond, which gave it any operation in the case at all. Having no authority to do this, the case

must be looked at as if no acceptance had taken place, and no bond had been taken or approved, and in the absence of such acceptance, there is an absence also of what the law requires, as to all sealed obligations, viz., a delivery. The bond was never delivered so as to go into operation at all.

In the case in 107 United States, 378, of *Kountze vs. Omaha Hotel Company*, it appeared that the court below had exacted a bond with a condition wider than the law authorized, and the Supreme Court held that the justice had no right to exact a bond in that form, and that as to the excess the bond was simply void. And so, it seems to us here, that the judge had no authority to approve or accept the bond, and that the bond and the whole of the proceedings are a mere nullity. Of course, as this point is conclusive of the whole case, it is not necessary for the court to examine the other questions presented by counsel, however interesting they may be, and we do not desire to commit ourselves upon them.

The result is, that the motion for a new trial must be sustained.

INDEX.

ADMINISTRATION. See *Executors and Administrators*.

ADVERSE POSSESSION.

1. A title by adverse possession, when that possession has continued for such period as is required by the Statute of Limitations to bar an action, is as good a title as any. *Cox vs. Cox*, 1.
2. Where a perfect title by more than forty years' adverse possession has been shown beyond a reasonable doubt the court will require the purchaser to comply with the terms of sale. *Id.*

ALIENS.

1. The operation of the convention between the United States and France of February 23, 1853, is limited to the States of the Union and has no application to the District of Columbia. *De Geoffroy vs. Riggs*, 331.
2. A citizen of France cannot acquire title to real estate in the District of Columbia by inheritance from a citizen of the United States. *Id.*

APPEALS. See *Crimes and Misdemeanors*, 6; *Trustees*.

1. The rule which applies to this court in regard to appeals is entirely different from that applying to the Supreme Court and the circuit courts of the United States; in this court an appeal lies from any order involving the substantial rights of the parties. *Edwards vs. Maupin*, 39.
2. An order overruling a motion to vacate an order ratifying a trustee's sale is an appealable order. *Id.*
3. The appointment of a receiver by a court of equity for the temporary care of property pending a controversy in the Orphans' Court over the right of administration is not an appealable order. *Emmons vs. Garnett*, 52.
4. Where a decree is partly in favor of complainant and partly in favor of defendant, and the complainant appeals from so much of it as is against him, and the appellate court finds no error in that portion of the decree, it must be affirmed *in toto*; there can be no correction of that which is against the defendant, he not having appealed. *Mason vs. Spalding*, 115.
5. It is not necessary that the matter appealed from should be a final order, if it be one involving the merits of the action or proceeding. *Fraser vs. District of Columbia*, 150..

APPEALS—Concluded.

6. An order refusing to tax an attorney's fee does not involve the merits of the action or proceeding, and is not, therefore, appealable. *Id.*
7. No appeal lies to the General Term from a decree or order merely respecting costs and expenses. *Johnson vs. District of Columbia*, 220.
8. While an appellate court should do nothing to encourage appeals for delay, yet where a suitor has made an honest effort to exercise his legal right of appeal, and has contravened no absolute rule, but has erred only in not complying with some technical form, it is the duty of the court to overlook such defect and entertain the appeal. *Lamon vs. McKee*, 446.
9. On an appeal from this court to the Supreme Court of the United States after a supersedeas bond has been accepted either in court or by a justice, the jurisdiction of this court and the power of the justice over the subject becomes exhausted. Consequently any subsequent order increasing the penalty of the bond is a nullity. *Bradley vs. Galt*, 614.

APPEARANCE, SPECIAL AND GENERAL. See *Practice* (in equity), 4-6.

ARSON. See *Crimes and Misdemeanors*, 10, 11.

ASSIGNMENT. See *Attorney at Law*, 1; *Lien*.

1. The president of a corporation organized under Section 554 of the Revised Statutes relating to the District of Columbia executed without the authority or direction of the stockholders an assignment of all its assets for the benefit of creditors. *Held*, That the assignment was void not only because not made by authority of the stockholders, but it would *seem* also because a corporation has no power to make an assignment for the benefit of creditors. *Meloy vs. Central National Bank*, 69.
2. An assignment of a right to file a bill in equity for a fraud committed on the assignor is void, and a bill filed by the assignee for such purpose should be dismissed. *Bailor vs. Daly*, 175.
3. But if it appears that the fund is in court and the court have jurisdiction over it, relief will be granted so far as to give to the assignee such share thereof as he may be otherwise equitably entitled to. *Id.*
4. Where a certificate of indebtedness, which is afterwards judicially declared void, is issued against a lot for benefits accrued to it by reason of opening an alley, and this certificate is delivered by the municipality to another lot holder in satisfaction of damages awarded him in the condemnation proceedings, an assignment of it by the latter to a third party as security for an indebtedness amounts to an equitable assignment of the

ASSIGNMENT—Concluded.

claim for damages, and entitles the assignee to enforce this claim against the city to the extent of the debt secured when default is made in the payment thereof. *McCormick vs. The District of Columbia*, 534.

ATTACHMENT. See *Corporations*.

1. By Equity Rule 82 an attachment and garnishment may issue upon a money decree of this court. *Reynolds vs. Smith*, 27.
2. That rule is valid, and was passed under the authority of Section 770 of the Revised Statutes relating to the District. *Id.*
3. While a court cannot vest itself with jurisdiction by its rules, yet it may regulate its process, for that is a matter of practice. *Id.*
4. A writ of attachment intended to be had against the Columbia National Bank of Washington City was returned by the marshal indorsed "Attached credits in the hands of the Columbia National Bank by service on E. J. Parker, cashier." The bank thereupon appeared and answered. On a motion by the judgment-debtor to quash the writ it was *Held*, that the absence in the return of the words "of Washington City" was immaterial. *Id.*
5. Where funds are deposited in bank in the name and to the credit of the judgment-debtor he will not, when they are attached, be allowed to set up as a defense to the attachment that he only holds such funds as agent or trustee; such a defense can only be made by the intervention in the cause of the principal or *cestui que trust*. *Id.*

ATTORNEY AT LAW. See *Appeals*, 4, 5; *Mandamus*, 1, 2.

An assignment by a client to his attorney of a portion of a claim against the United States, which claim the attorney is engaged in prosecuting, comes within the mischief and the letter of the Act of Congress of 1853, prohibiting assignment of claims against the United States. *Woods vs. Dickinson*, 301.

BILLS OF EXCEPTION. See *Crimes and Misdemeanors*, 2; *Instructions to the Jury*, 1, 2; *New Trials*, 2-7; *Practice (at law)*, 12.**BUILDING REGULATIONS.**

1. There is no limitation to the character and extent of the building regulations which the District Commissioners are authorized to make and enforce under the Act of Congress of June 14, 1878. The terms of that act are broad enough to include every form of building regulations that the Commissioners may deem advisable, and which may reasonably be considered as a proper subject of regulation. See *United States ex rel. Strasburger vs. The Commissioners*, 5 Mackey, 389; *United States vs. Cole*, 504.

BUILDING REGULATIONS—Concluded.

2. And although the authority to subject to private and individual use lands belonging to the United States is a substantive power, and, therefore, is not included as an incident, in even the most unrestricted power to make regulations about buildings on individual holdings, yet it must be assumed, in construing the Act of 1878, that Congress, in granting to the Commissioners power to make building regulations, had in mind, and acted with reference to, what had already been done under the name of making building regulations, and as the previous building regulations of the city of Washington authorized the occupation of the streets by permanent projections, it cannot be doubted that the authority vested in the Commissioners by the Act of 1878 carried with it power to provide for such occupation of the streets. *Id.*
3. The building regulations, which the Commissioners were authorized to make by the Act of 1878, have the same effect until regularly altered by the Commissioners as if they had been enacted by Congress. *Id.*
4. These building regulations authorize projections from the building line of a street or avenue in front of a private holding, thus making the building line the basis and condition of the privilege, but there is no authority to make projections from something which cannot be considered a building line, thus: The apex formed by the meeting of the building lines of M street and Massachusetts avenue, northwest, is not in any sense a building line, and these regulations, therefore, do not authorize any projections from and in front of that apex. *Id.*
5. The power given the Commissioners by the Act of 1878 to make rules regulating projections from the building line was a power to make general rules governing all persons alike and not to empower them to decide each case independently and without rule; where, therefore, the building regulations provide that projections from the building line shall not exceed 14 feet in width, a further provision that such width may be exceeded when approved by the Engineer Commissioner is unauthorized and inoperative. *Id.*
6. The building regulations of the District of Columbia give the right to take down and remove and reconstruct a party-wall on condition that the expense be paid exclusively by the building owner, and that "he shall also make good all damage occasioned thereby to the adjoining owner or his premises." *Fowler vs. Saks*, 570.
7. One cannot take the benefit of a building regulation and repudiate the condition on which it is given. *Id.*

BURDEN OF PROOF. See *Partnership*.

1. In an action for damages to recover for injuries received by reason of the negligence of the defendant, the burden is upon the defendant to show, by a preponderance of evidence, contributory negligence on the part of the plaintiff if that is set up as a defense. *Harmon vs. Wash. & G. RR. Co.*, 255.
2. In establishing such preponderance the defendant is not confined to the testimony offered in his own behalf, but he may adopt such of the plaintiff's testimony as tends to show contributory negligence. *Id.*

CERTIORARI.

Where *certiorari* proceedings have been dismissed by the petitioner, costs to the defendant are not allowable. *Fraser vs. District of Columbia*, 150.

CIRCUIT COURTS. See *Statute of Limitations*, 1-4.

CLOUD ON TITLE. See *Practice* (in equity), 1.

1. A court of equity will interpose to remove a cloud upon the title to real estate, where such a cloud has existed so long, as by the record it is questionable if the title of the defendant is not *prima facie* better than the complainant's. *Gibbons vs. Duley*, 320.
2. Where on a bill to remove a cloud upon title to real estate it does not appear that the defendant ever laid claim to any interest in the premises, the court, while it will remove the cloud, will impose the costs upon the complainant. *Id.*

CONDEMNATION. See *Assignment*, 4.

1. In a suit to establish a title derived from condemnation proceedings all the facts necessary to the jurisdiction to condemn must be established. *Bradford vs. The District of Columbia*, 353.
2. But when the relief sought is the annulment of the condemnation the burden is on the party asking such relief to show that the proceedings were illegal. *Id.*
3. B, being owner of a lot of ground, a portion of it was condemned as an alley. Afterwards complainant conveyed the lot to C, describing it as bounded by said alley. At a still subsequent period B, by bill in equity attacked the condemnation proceedings as void. *Held*, That B's conveyance to C, while it did not dedicate the alley to the public, gave to C and his assigns the right to enjoy the alley as an easement, and, therefore, even if the condemnation proceedings were void equity would not interfere. *Id.*

CONTRACTS.

It seems that where one fully understands the contract he is entering into he may lawfully bind himself, for a fair consideration, not to pursue his vocation within reasonable limits as to time and place. *Berlitz vs. Strack*, 491.

CONTRIBUTORY NEGLIGENCE. See *Burden of Proof*, 1, 2; *Instructions to the Jury*, 3, 4; *Negligence*, 1, 2-4.

CORPORATIONS. See *Assignment*, 1, 5.

Stock in a corporation, although the certificates thereof are taken into the manual possession of the marshal are not the subject of attachment in this District. *Duncanson vs. Bank of the Republic*, 348.

COSTS. See *Appeals*, 6; *Certiorari*, 1; *Crimes and Misdemeanors*, 6.

CRIMES AND MISDEMEANORS.

1. An indictment under Section 5487, R. S. U. S., charging the accused with having in his possession a letter containing five certificates, each "being of the deposit of one silver dollar *with the Treasurer of the United States*" is sufficient, although upon the certificates themselves the words "in the Treasury" are used. *United States vs. Eliason*, 104.
2. Whether Section 803, R. S. D. C., which enacts that it shall not be necessary that the justice trying the cause shall sign and seal the exception, applies to criminal cases *quaræ*. *Id.*
3. After a trial in the Police Court and appeal had to the Criminal Court the defendant cannot, without consent or leave of court, withdraw his plea of not guilty to plead misnomer in abatement. *District of Columbia vs. Rubert*, 208.
4. In a criminal case tried on information in the Police Court, where an appeal is taken to the Criminal Court, and the defendant is acquitted, there is no provision of law by which he may have judgment for costs and witness fees. *District of Columbia vs. Lyon*, 222.
5. The hardship of such cases may be materially reduced by the application of Section 839, R. S. D. C., which provides that the judge trying the case may allow a necessary number of witnesses for defendant, the fees and costs of service to be paid in the same manner as Government witnesses are paid. *Id.*
6. The defendant is entitled to a return of a deposit made under Rule 128, regulating appeals from the Police Court. *Id.*
7. It is too late to object for the first time to the manner of impaneling the jury after it has been impaneled and sworn. *United States vs. McBride*, 371.
8. It is a matter of discretion with the court whether it will direct the prosecution to elect on which count of an indictment it will proceed, and a refusal so to do is not reviewable. *Id.*
9. It is sufficient to charge in an indictment that the defendant, "with the intent to injure and defraud a certain corporation, known as and called 'The President and Directors of the Fireman's Insurance Company of Washington and Georgetown,' did set on fire with intent to burn, and did burn, a certain house

CRIMES AND MISDEMEANORS—Concluded.

(describing it) against the form of the statute," &c., without averring any insurance on or interest in the property by the company. *Id.*

10. Objections to the sufficiency of the indictment, though in the discretion of the court so to do, ought not to be entertained during the trial of a cause, except on very urgent occasions. *Id.*
11. The insurance company, which it was alleged the defendant intended to defraud by setting on fire the building on which the policy was issued, was described in the indictment as "The President and Directors of the Fireman's Insurance Company of Washington and Georgetown." *Held*, That this was a sufficient description, there being no evidence adduced to show its incorrectness. *Id.*
12. It is not necessary in an indictment for violating Section 1151, R. S. D. C., to allege the ownership of the house which the defendant burned or attempted to burn. The offense created by that section is not the common-law crime of arson, and it is sufficient if the property is so described as to be capable of identification. *Id.*

DEATH.

Where one has been absent from his home and family for eleven years, and has never been heard of during that period, his death will be presumed. *Baden vs. McKenny*, 268.

DEED. See *Marriage Settlements*, 1; *Mortgage*, 1; *Evidence* 7.

1. A limitation in a deed, mediately or immediately, to the right heirs of the grantor is void, for a man cannot convey to his heirs by deed. *Miller vs. Fleming*, 139.
2. Nor does it make any difference that the conveyance is to trustees to the use of another for life and afterwards to the use of his heirs; the last use will be a resulting use to himself in fee, and he will have as perfect a legal reversion as if he had made a common-law conveyance for life only. *Id.*
3. Nor does it make any difference that in addition to limiting the estate to the use of his heirs the grantor adds a direction to convey to them. *Id.*
4. Nor that he directs the conveyance to be made to them "as tenants in common and not as joint tenants." *Id.*

DIVORCE. See *Husband and Wife*, 2, 3; *Residence* 1-4.

1. On a petition for divorce, filed by the husband, on the ground of willful desertion and abandonment, the petition will be dismissed where it appears that the wife left with the consent of the husband. *Smithson vs. Smithson*, 227.

DIVORCE—Concluded.

2. So, even where it appears that the departure of the wife was caused by mistaking the language of the husband as a consent to the departure, yet the bill will be dismissed if it appears that no effort was made to rectify the wife's error by inviting her to return. *Id.*
3. The proof of residence in this case reviewed and held to meet the statutory requirement that the party applying for divorce shall have "resided within the District for two years next preceding the application." *Bradstreet vs. Bradstreet*, 229.

DOMICILE. See *Residence*.

DOWER.

1. On a creditor's bill praying the sale of decedent's real estate a decree was passed first assigning to the widow a portion of the property which she had agreed to accept as her dower, and directing a sale of the remainder. At the sale the property brought a much larger price than had been anticipated by the parties, whereupon the widow petitioned for a re-assignment of her dower, alleging that the first admeasurement had been accepted by her under misapprehension as to the real value of the estate. *Held*, on demurrer, that the petitioner was entitled to a re-assignment. *Young vs. Young*, 243.
2. The value of a widow's dower in lands aliened by her husband is to be determined according to their value at the time of the valuation, deducting therefrom any increase which may have arisen from the labor and money of the purchaser. *Baden vs. McKenny*, 268.

EJECTMENT. See *Practice* (at law), 2, 3.

1. Two joint tenants of real estate conveyed the property to trustees to secure the payment of a debt. Afterwards, the debt being paid, the trustees reconveyed the estate to them as tenants in common. *Held*, in an action of ejectment, that it was immaterial that the trustees may have committed a breach of trust in reconveying to their grantors a title differing from that which they had held before the creation of the trust. This action deals only with the legal title, and a conveyance by a trustee, even in disregard of his duty has the usual legal effect of a deed. *Pierce vs. Jacobs*, 498.
2. Parties to a suit are made by the statute competent as witnesses to prove any fact admissible in evidence; it is not error, therefore, to permit the plaintiff in ejectment to prove by his own testimony his relationship to the ancestor under whom he claims; the rule as to proof *aliunde* in matters of pedigree does not exclude parties as witnesses. It only requires proof *aliunde* the declarant. *Id.*

EJECTMENT—Concluded.

3. The records in the office of the clerk of the Circuit Court of the District of Columbia showed that plaintiff's ancestor made a declaration, on the 10th of December, 1835, of his intention to apply for letters of naturalization, but no record of his admission to citizenship was found. *Held*, inadmissible to show (for the purpose of proving that he must have been subsequently admitted to citizenship) that the applicant afterwards voted without challenge at several elections held in the District; such evidence would only be admissible for that purpose after proof going to show the loss of the record, such as that the clerk's office had been searched for the records of naturalization proceedings had during that period, and that they could not be found. *Id.*
4. When the plaintiff in ejectment claims as heir, he is not confined to proving the marriages of parents and grandparents by producing the record, or a certified copy thereof, of such marriages, or by the testimony of a witness present at the ceremony, or by proof of the declarations of deceased persons related by blood or marriage, but he may make proof of facts from which such marriages may be inferred. *Green vs. Norment*, 5 Mackey, 80, affirmed as to this rule. *Id.*

EQUITABLE ASSIGNMENT. See *Lien*.**EQUITABLE LIEN.** See *Lien*; *Practice* (in equity), 9-11-13.**ESTOPPELS.** See *Wills*, 3.

While a grantor is estopped to deny that his deed actually conveyed what it purports on its face to convey, he is not estopped to deny that it did purport on its face to convey the interest alleged by the grantee. *Walbridge vs. Hammack*, 154.

EVIDENCE. See *Burden of Proof*, 1, 2; *Condemnation*, 1, 2; *Ejectment*, 2, 4; *Executors and Administrators*, 1, 3; *Practice* (at Law), 9, 10; *Statute of Limitations*, 4.

1. In addition to recover damages for injuries received by reason of the defendant's negligence, it appearing that plaintiff was discharged by her employer by reason of disability resulting from the injury which prevented her from performing her duties, evidence of the salary received by her in such employment is competent as tending to show the capacity for earning income which the plaintiff possessed and was exercising at the time of the injury. *Corts vs. District of Columbia*, 277.
2. So evidence of value of the work which plaintiff has been able to do since the injury is competent for the purpose of showing how far plaintiff's capacity to do work has been impaired by reason of the injury. *Id.*

EVIDENCE—Concluded.

3. Where there is a general exception to the admission of testimony, if the testimony is competent for any purpose the exception will be overruled. *Id.*
4. Where the language of a written contract leaves it in doubt as to what is its subject-matter, parol evidence may be received to show the circumstances surrounding the parties at the time of contracting, for the purpose not of changing or altering its meaning, but of throwing light upon the language used and ascertaining the true meaning of the contract. *Mason vs. Spalding*, 115.
5. Evidence as to the value of plaintiff's business is admissible in an action to recover damages caused by plaintiff's sickness and inability to attend to the same through the fault of the defendant. *Prindle vs. Campbell*, 598.
6. Courts of equity do not weigh testimony by the number of the witnesses alone. Circumstances and known facts may often establish the truth more conclusively than the oaths of the parties or the written depositions. *Benter vs. Patch*, 590.
7. Where a deed executed in pursuance of a bond to convey is uncertain on its face, resort may be had to the bond for the purpose of ascertaining the meaning of the deed. *Gibbons vs. Duley*, 320.
8. Where the defendant in a partition suit has no interest in the moiety claimed by the complainants, the court will not scrutinize very closely the weight of the testimony introduced upon the issue raised as to the title of the complainants as heirs of the admitted former owner. *Thomas vs. Holtzman*, 62.

EXECUTORS AND ADMINISTRATORS. See *Statute of Limitations*, 1-3.

1. Where executors have settled their estate, but retain control thereof as trustees under the will, in a suit in which judgment must be rendered for or against them as such trustees, and not as executors, either party may testify; such a suit is not within the provisions of Section 858, R. S. U. S., and Section 876, R. S. D. C. *Droop vs. Metzertott*, 89.
2. Services performed by plaintiff for the testatrix during her lifetime in expectation of receiving a legacy will not deprive him of his right to bring suit for such services against the estate of the deceased; nothing short of an understanding between the parties would have that effect. *Robeson vs. Niles*, 182.
3. The provision of Section 858, R. S. U. S., excluding parties in a suit by or against personal representatives from testifying as to any transaction with or statement by the testator or intestate, does not inhibit a party from testifying that an alleged transaction never took place between him and the intestate. The application of the statute is to be strictly limited to the cases covered by the proviso. *Andrews vs. Hunt*, 311.

EXECUTORS AND ADMINISTRATORS—Continued.

4. Nor does the statute apply to the transactions with the *agents* of the deceased. *Id.*
5. Where, in a suit against an administrator to cause him to deliver up certain notes found by him among his intestate's effects and apparently the property of the intestate, but which, in fact, had been left with the latter by the plaintiff for safe-keeping over five years previous to his death and been overlooked, it was adjudged that as the laches of the plaintiff and his lack of business method had caused the suit he should be decreed to pay the costs, although upon the main question he was entitled to prevail. *Id.*
6. The proceedings authorized by Sec. 6, Subch. 6, of the Maryland Act of 1798, when an executor or administrator fails to return an inventory of the estate within three months after the date of his letters, applies only to the ordinary inventory provided for by the act and not to any special inventory that may be ordered by the court. *In re Estate of Patten*, 372.
7. When a special inventory has been ordered the court may extend the time for returning such inventory. *Id.*
8. The provisions of Sec. 6, Subch. 6, of the Act of 1798, are not to be rigorously construed against an executor who has failed to return an inventory within the time prescribed by the act, but an extension of time should be granted where satisfactory reasons for so doing are shown to the court, especially when it appears that no damage has resulted to any one from the delay. *Id.*
9. So, when an executor has failed to join with his co-executors in the return of the inventory or to return any other within three months, as prescribed by the act, the time may be extended by the court, and this although such excuse be not presented until more than two months after the filing of the inventory by the other executors. *Id.*
10. An executor or administrator can only be removed by the court for legal and specific causes and after citation and an opportunity to be heard. *Id.*
11. Technical rules of pleading and practice are not to be applied between parties in the Orphans' Court. *Id.*
12. On a motion by co-executrices to remove one of their number from her office on the ground of failure to join with them in their inventory or to file one of her own within the time prescribed by the Act of 1798: *Held*, That the reasons given by the respondent, viz., sickness and the refusal on the part of the other executrices to exhibit to her evidences of claims made by them in the inventory, constituted a sufficient excuse for such failure, although such excuse was not given the court until more than two months had elapsed since the filing by the other executrices of their inventory. *Id.*

EXECUTORS AND ADMINISTRATORS—Concluded.

13. A claim verified under the Maryland Act of 1798 and passed by the Orphans' Court does not release the executor from the duty of defending against the claim if he knows of any defense, but if he knows of none he may safely pay it, and it will be allowed as a credit in his account against the personal estate. *Hunt vs. Russ*, 527.
14. But the order passing the claim is not even *prima facie* evidence of its validity as against the heir or devisee; so that if the executor pays the claim, and afterward seeks, because of overpayment, to be re-imbursed out of the realty, he must produce original evidence of the validity of the claim. *Id.*

FRAUD. See *Assignment*, 23; *Practice* (in equity), 12, 14, 15; *Statute of Limitations*, 5, 6.

1. Before a sale will be set aside for inadequacy of price alone it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once a suspicion of fraud. *Bailor vs. Daly*, 175.
2. A sale of real estate at a price so grossly inadequate as to shock the moral sense of any one to whom the facts are known will be set aside, especially where it is accompanied with evidence of fraud and misrepresentation. *Benter vs. Patch*, 590.

FRENCH CITIZENS. See *Aliens*.

GARNISHMENT. See *Attachment*.

HUSBAND AND WIFE. See *Wills*, 1-5; *Divorce*.

1. Where slaves with the consent of their masters lived together in the State of Maryland as husband and wife, such a union, according to the custom of that State, was sufficient to establish a marriage between the parties. Consequently, under the act of Congress of February 6, 1879, the issue of such a marriage must be regarded as legitimate in the District of Columbia for all the purposes of descent and inheritance. *Thomas vs. Holtzman*, 62.
2. A purchase of real estate with the joint means of husband and wife, and the placing of it in the wife's name imply a settlement by the husband upon his wife of the property to every extent that the consideration came from him, and the court will not, upon a divorce being granted the wife, disturb such a settlement, when voluntarily and fairly made before the cause of action arose on which the divorce was granted. *Hinds vs. Hinds*, 85.
3. *Jackson vs. Jackson*, 1 Mac A., 34, explained and distinguished. *Id.*
4. A bond given by husband and wife, though void as to the wife, will be good as to the husband, and a deed of trust given by the wife upon her separate property to secure such a bond is valid. *Kleindienst vs. Johnson*, 356.

INDEPENDENT CONTRACTOR.

1. The rule that where there is an independent contractor he, and not the employer, is liable for injuries to third persons, is subject to a number of exceptions, among which is where the employer is under pre-existing obligations to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation of employer and contractor; thus, where one is permitted by municipal regulation to remove and reconstruct a party-wall on condition of making good all damages to the adjoining owner or his premises, he cannot shift the responsibility for resulting damages to the contractor who has done the work. *Fowler vs. Saks*, 570.

INDICTMENTS. See *Crimes and Misdemeanors*, 1-7-13.

INFANTS.

1. Where, in a proceeding in equity to sell lands, the record shows that the infant defendants were cited and brought into court. *queræ* whether it is competent to contradict the record by oral evidence so as to show, as matter of fact, that they were never cited and were never brought into court. *Marshall vs. Wheeler*, 414.
2. Where, however, it appears that the proceeding was for the benefit of the infants and to carry out an express provision of a will, such proceeding will not be invalid because the infants were not cited and brought into court. *Id.*

INSTRUCTIONS TO THE JURY. See *Negligence*, 5; *Replevin*, 1, 2.

1. Where the portion of the charge excepted to, if taken literally, gives no point to the exception, the language of the court will be so construed as to give it a meaning consistent with the general tenor of the whole charge. *United States vs. Eliason*, 104.
2. Where the instructions of the court are not justified by the testimony as it appears in the bill of exceptions a new trial will be granted. *Fay vs. Anglim*, 216.
3. An instruction which leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory, should not be granted.
4. The court should not rule as a matter of law that the plaintiff has been guilty of contributory negligence unless the facts on which such a ruling must rest are undisputed. *Harmon vs. W. & G. R. R. Co.*, 255.

JUDICIAL SALES. See *Adverse Possession*; *Trustees*, 1, 2, 3, 4.

1. A purchaser at a judicial sale has no right to question the regularity of the proceedings prior to the decree of sale. *Cox vs. Cox*, 1.
2. But such a purchaser will not be required to take a doubtful title, however derived or acquired. *Id.*

JURISDICTION. See *Appeals*, 9.

LACHES. See *Executors and Administrators*, 5.

LIEN. See *Mechanic's Liens; Practice* (in equity), 9-11, 13.

1. A mere agreement to pay out of a particular fund is not sufficient to establish an equitable lien. There must be an appropriation of the fund *pro tanto*, either by giving an order, or by otherwise transferring it, in such a manner that the holder of the fund will be authorized to pay the amount directly to the creditor without the further intervention of the debtor. *Woods vs. Dickinson*, 301.

LIMITATIONS. See *Statute of Limitations*.

MANDAMUS.

1. Whenever a reasonable suggestion of its necessity for the purposes of evidence is made by the person requesting it, the Commissioner of Patents cannot lawfully refuse to furnish a certified copy of an abandoned or rejected application for a patent; the right to be furnished such a copy is given the public by statute, and the refusal thereof entitles the applicant to the writ of mandamus against the Commissioner to compel a compliance with such request. *U. S. ex rel. Pollok vs. Hall*, 14.
2. An attorney at law who has requested such a copy in behalf of his client and been refused has such an interest in the subject-matter as entitles him to commence proceedings in his own name as relator for the writ of mandamus. *Id.*
3. The Commissioner of Pensions is invested with a judicial discretion in his interpretation of the law as to the amount due a pensioner for a given disability, and this court cannot interfere by mandamus to correct it. *U. S. ex rel. Miller vs. Raum*, 556.

MARRIAGE SETTLEMENTS. See *Deed*, 1-4.

5. In a marriage settlement the estate was conveyed to a trustee to the use of the wife for life with remainders over to the use of the issue of the marriage, and failing such issue to the use of the right heirs of the settlor, their heirs and assigns, and the trustee was directed to convey to them "as tenants in common and not as joint tenants." After the marriage the husband died leaving a will, which after devising other property not included in the deed of settlement, gave the rest and residue of his estate to his grandson. The wife then died, and there being no issue of the marriage it was *Held*, That the limitation to the right heirs was void, and the estate passed to the grandson under the residuary clause of the will. *Miller vs. Fleming*, 139.

MARRIED WOMEN. See *Husband and Wife*.

MECHANIC'S LIENS.

1. The Mechanic's Lien Act of 1884 does not extend to the subcontractor of a subcontractor so as to give the latter a lien upon the property. *Monroe vs. Hannan*, 197.

MORTGAGE.

Although a mortgage be a legal title, it is not the fee simple absolute of the land, and language in a deed which might be sufficient to convey the latter, will nevertheless be construed as purporting to convey only the former if that intention is shown by recitals or by anything within the four corners of the deed. *Walbridge vs. Hammack*, 154.

NEGLIGENCE. See *Evidence*, 1, 2; *Instructions to the Jury*, 3, 4.

1. Contributory negligence cannot be attributed to the plaintiff, merely because he was negligently guilty of an act which exposed him to a possible danger having no relation to the accident which actually occurred. *Harmon vs. W. & G. R.R. Co.*, 255.
2. A passenger upon a street car has a legal right that the car shall not merely slow up but shall actually stop in order to allow him to alight, and he has a right to assume that this will be done; if, therefore, the passenger, for the purpose of alighting, gets upon the car-step while the car is slowing, but, instead of stopping, it suddenly starts again with a jerk, by reason of which the passenger is thrown from the car and injured, he is not to be charged with contributory negligence by being upon the step while the car was in motion, for he had a right to anticipate that the car would stop, and there was, *in contemplation of law*, no risk that the car would start again, either with a sudden jerk or otherwise, until he alighted. *Id.*
3. Where a defect in a street pavement will be dangerous when covered with ice or snow, and the defendant, a municipality, has knowledge of that fact, the occurrence of a snow-storm is immediate notice to it that the pavement, at that point, is in a dangerous condition. *Corts vs. District of Columbia*, 277.
4. Where a defective pavement is not rendered practically impassable by reason of such defect, a person passing along the same is not guilty of contributory negligence unless there is an omission to exercise proper care. *Id.*
5. Where the District authorizes excavations in a public street so as to leave the street in an unsafe condition for pedestrians, it is at once chargeable with the duty of seeing that proper safeguards are provided to prevent accidents; an instruction, therefore, which directs the jury to find for the defendant, unless they believe that it had actual or constructive notice by lapse of time of the insufficiency of such safeguards, should not be granted. *McPherson vs. District of Columbia*, 564.

NEW TRIALS. See *Crimes and Misdemeanors*, 12; *Practice* (at law), 2, 4-9.

1. Where a series of forty prayers were refused by the court, the fact that one of them which was unsegregated from the others contained a correct proposition of law affords no ground for a new trial when it appears that the judge's charge stated substantially the same proposition. *United States vs. McBride*, 371.
2. A motion under Sec. 804, R. S. D. C., and Rule 54 of this court, to be technically correct, should explicitly ask the justice who tried the cause to entertain a motion *made on his minutes* to set aside the verdict and grant a new trial "*upon exceptions*," &c. *Jones vs. Railroad Company*, 426.
3. A motion made under Sec. 806, R. S. D. C., "to set aside the verdict and grant a new trial on exceptions," while not technically in proper form is not invalid because of the omission of the words "bills of," if the circumstances surrounding the conduct of the parties in connection with the motion show that the motion contemplated was that provided for by Sec. 806. *Id.*
4. It is not requisite in a motion for a new trial under Sec. 806 to enumerate the grounds upon which the motion is founded, the object of the motion being to procure a review of all the rulings already enumerated in the exceptions. *Id.*
5. The power to make Rule 62 of this court (which provides for the extension of the term for the purpose of settling bills of exception) was given by Sec. 770, R. S. D. C., and that rule is, therefore, valid. *Id.*
6. While it would be more proper to specify the time to which the term is extended by an order of the court, under the provisions of Rule 62, and also to specify the cases which are designed to be entitled to claim the benefit thereof, yet an omission to do so does not invalidate the order. *Id.*
7. The adverse party is entitled to no other notice of an order extending the term for the purpose of settling bills of exceptions than that given by its entry on the minutes of the court. *Id.*
8. The "case" to be prepared on a motion for a new trial to be heard in the General Term under the provisions of sections 803, 805, 806, R. S. D. C., is a statement of all the evidence which was produced at the trial; not the result of the evidence but the evidence itself. *In re Will of John Hoover*, 541.
9. The only object of such a "case," upon a motion for a new trial, is to raise the question of the insufficiency of the evidence to maintain the case, or the question of excess in the damages awarded by the jury. *Id.*

NEW TRIALS—Concluded.

10. When the justice trying the cause entertains a motion for a new trial upon exceptions, or for insufficiency of evidence, or for excessive damages, and grants a new trial, the plaintiffs may appeal to the General Term from such decision. *Id.*
11. *Doddridge vs. Gaines*, 1 *MacArthur*, criticised and much of the opinion in that case declared to be *obiter*. *Id.*
12. The court may grant a new trial on the ground that the verdict is against the weight of the evidence. *Id.*
13. Where a new trial is granted on such ground, an appeal lies to the General Term. *Id.*
14. But on the hearing in General Term every intendment must be in favor of the action of the trial justice; and especially will this be the case where the verdict was against the validity of a will. *Id.*

NOTICE. See *Negligence*, 3, 4, 5.

ORPHAN'S COURT. See *Executors and Administrators*, 6, 14.

PARTNERSHIP.

Where defendant, one of a firm of real estate dealers, is decreed to account to his co-partners for profits made in joint operations with a third party in real estate without the knowledge or consent, and in fraud of the rights of his copartners, and on such accounting complainants, by such evidence as they are able to obtain, trace into defendant's hands more than sufficient money derived from such operations to pay him for his share of the profits thereof, the burden is upon him to show by affirmative proof that as to certain of said operations he never received his share of the profits; and while it may be his misfortune it is no answer that he cannot now disclose and establish a full and complete account of the joint operations and of the adjustment of the accounts between himself and his illegal partner, so as to rebut the presumptions growing out of the evidence offered. *Kilbourn vs. Latta*, 80.

PATENTS. See *Mandamus*.

PAYMENT.

1. The payment of money to an official to avoid an onerous penalty, though the imposition of the penalty may be illegal, is such an involuntary payment as entitles the party paying it to maintain an action for its recovery. *Hill vs. The District of Columbia*, 481.
2. In such an action it is not necessary for the plaintiff to show that he made the payment under an immediate and urgent necessity to avoid the infliction of the penalty. *Id.*
3. Whether the payment was voluntary or involuntary, is a question of fact to be determined like other questions of fact and not by arbitrary rule. *Id.*

PAYMENT OF MONEY INTO COURT. See *Practice* (in equity), 9.

PENSIONS. See *Mandamus*, 3.

POLICE COURT. See *Crimes and Misdemeanors*, 3, 6.

POTOMAC FLATS.

1. The acts of Congress of August 2, 1882, and 5, 1886, directing the Attorney-General to institute a suit in this court, "in the nature of a bill in equity," for the purpose of establishing the title of the United States to the Potomac River flats, and fixing a time within which all persons claiming an interest therein should answer, are to be construed as meaning that the proceedings in such suit are to be according to the usual course in courts of equity. *United States vs. Morris*, 8.
2. In accordance with such course, the justice presiding is invested with a discretion upon proper showing to permit a party at any time before final hearing to amend a pleading or to file a supplemental pleading if facts have arisen since the filing of the original pleading. *Id.*
3. Since the intention of Congress in directing this proceeding was to completely quiet the title of the United States to the lands in question, the court upon an application to file a supplemental answer will not scrutinize the character of the claim proposed to be set up, but will defer that to final hearing on the merits. *Id.*

PRACTICE (at law). See *Crimes and Misdemeanors*, 1, 2; *Ejectment*, 1-4; *Instructions to the Jury*, 1, 2; *New Trials*; *Replevin*, 1, 2; *Wills*, 3-5.

1. When a witness is cross-examined upon a matter not directly bearing upon anything brought out on the examination in chief, it is within the discretion of the justice trying the cause to determine how far such cross-examination shall be allowed. *United States vs. Eliason*, 104.
2. Where in action of ejectment the acts and conversations of the testator are given in evidence for the purpose of ascertaining the meaning of an uncertain description of lands devised, the verdict of the jury will not be disturbed unless it be clearly against the weight of the evidence. *Walbridge vs. Hammack*, 154.
3. In an action of trespass, the court below instructed the jury as to the measure of damages in case the defendant was found guilty; the jury found the defendant not guilty: *Held*, that even if the court were wrong in its instruction as to the measure of damages, the verdict should not be disturbed, inasmuch as the finding of not guilty showed that the consideration of the question of damages was manifestly never reached by the jury. *Manning vs. Union Transfer Co.*, 214.

PRACTICE (at law)—Concluded.

4. Though this court sitting in General Term may grant a new trial on the ground that the verdict was contrary to the evidence, it will exercise that power with great caution, especially where the judge below was of the opinion that the verdict should not be disturbed and upon the points presented by the instruction there was evidence upon both sides. *Prindle vs. Campbell*, 598.
5. An exception to the admission of evidence cannot be sustained where it does not point out upon what ground the objection was made. *Id.*
6. It is entirely within the discretion of the trial judge to admit evidence on the rebuttal which ought to have been offered in chief, and an exception will not lie to his ruling on that subject. *Id.*
7. Where the trial below was fairly conducted and the law of the case was fully and substantially applied, the appellant obtaining the benefit of all the law to which he was entitled or which he sought to obtain, there can be no good reason for reversing the judgment for matters immaterial or upon mere refinements as to the terms in which propositions have been submitted to the jury. *Id.*
8. Where the bill of exceptions does not contain the evidence offered at the trial, the court cannot pass upon the correctness of a charge which to properly review involves an examination of the evidence. *United States vs. McBride*, 371.

PRACTICE (in equity). See *Appeals*, 1, 3; *Assignment*, 3; *Attachment*, 1-5; *Condemnation*, 1, 2, 3; *Contracts*, 1; *Executors and Administrators*; *Husband and Wife*, 2, 3; *Infants*, 1, 2; *Partition*; *Partnership*; *Potomac Flats*, 1, 2, 3; *Trustees*, 1, 2.

1. A tenant in common is entitled to have a legal incumbrance and cloud upon the common property removed at his own suggestion; it is not necessary to join his co-tenant in the proceeding. *Bates vs. District of Columbia*, 76.
2. Where a solicitor has entered an unauthorized general appearance for the defendant and afterwards a decree *pro confesso* is taken for want of an answer, the defendant may, by motion and a special appearance for that purpose only, have the general appearance stricken out and the decree *pro confesso* vacated. *Woods vs. Dickinson*, 301.
3. An order of the court below, refusing to extend the time for taking testimony, is not appealable. *Id.*
4. It seems that when a special appearance is entered for the purpose of having an unauthorized general appearance stricken out on motion, the court cannot order a commission to issue to take testimony for the purpose of ascertaining whether the general appearance was authorized; such an order presupposes the entry of a general appearance, and assumes the very point in issue. *Id.*

PRACTICE (in equity)—Continued.

5. An appearance by counsel, who, it is alleged, had no authority to waive process and defend a suit may be explained ; such an appearance, unless authorized, does not bind the party appeared for, and a judgment or decree rendered in consequence of it is a nullity. Such warrant of authority may be proved by the attorney himself. *Id.*
6. The fact that a notice of motion and a copy of the proposed motion had been served upon plaintiff's counsel, does not, unless the motion has been actually filed in court, constitute such an appearance as waives the necessity for process when it appears that the proposed motion was abandoned and never acted upon. *Id.*
7. The Court in General Term can hear and determine no chancery cause at first instance, unless it comes to it duly certified for such hearing by the Equity Court. *Duncanson vs. Bank of Republic*, 348.
8. Where it is evident that a cause certified to the General Term for hearing in the first instance cannot be proceeded with because of the absence of necessary parties, the cause will be remanded for amendment of the pleadings. *Id.*
9. In considering whether the court has jurisdiction to pass an interlocutory decree that defendant pay a certain fund into court on the ground that complainant has an equitable lien thereon, the allegations of the bill will alone be looked to, the statements of the answer or other portions of the pleadings cannot be regarded ; for, unless charged in the bill, such facts are not properly in issue and no such relief can, therefore, be decreed in respect of them. *Lamon vs. McKee*, 446.
10. It is not sufficient merely to allege an equitable lien or trust in order to obtain a decree satisfying the plaintiff's demand out of a particular fund ; but circumstances must be shown from which the court may be able to see that the allegation is justified by the facts set forth. *Id.*
11. There must be a specific assignment and appropriation by the debtor of the fund or part of it, to the payment of the creditor's claim, before an equitable lien is obtained ; the mere allegation that the debtor is alleged to be insolvent and that he has promised to pay the debt out of the fund is not sufficient. *Id.*
12. It is not proper for a plaintiff to claim in his bill that an instrument is fraudulent and should for that reason be declared void ; and then to insist, if it should be held valid, that he is entitled to its benefits ; such contradictory claims in the same bill are not to be encouraged ; the pleader must claim either under or against the instrument. *Id.*
13. Where before the final hearing of a cause on appeal efflux of time has rendered the relief sought by the bill futile, the court will refuse to pass upon the question submitted. *Berlitz vs. Strack*, 491.

PRACTICE (in equity)—Concluded.

14. Where a bill charges fraud in fact, and plaintiff fails in his proof, he cannot be aided under the prayer for general relief. *Bailor vs. Daly*, 175.
15. But this doctrine does not prevent the court from considering other allegations in the bill of such serious irregularities as would, if true, establish that there was no legal sale at all. *Id.*

PRESUMPTION OF DEATH. See *Death*.PRO CONFESSO. See *Practice* (in equity), 2.

PURPRESTURE.

An unauthorized encroachment by private persons, upon the streets of the city of Washington is a purpresture which the United States, having the legal title to the streets for the public benefit, may, by proceedings in equity, secure a mandatory injunction to prevent and remove. *United States vs. Cole*, 504.

RECIEVERS. See *Appeals*, 2.

REPLEVIN.

1. Where the property of a stranger to the writ has been levied on, a demand is not necessary before bringing replevin. *Williams vs. Luckett*, 273.
2. Where personal property has been conveyed by a chattel deed of trust to secure an indebtedness and is afterwards, while remaining in the grantor's possession, levied on to satisfy an execution, it is not error, on replevin brought by the trustee, to refuse to instruct the jury that if they believe the *cestui que trust* allowed the property to remain in the grantor's hands for an unreasonable time after the maturity of the indebtedness a presumption was raised that the debt was paid or that the deed of trust was held unreleased only as a protection against other creditors of the grantor; it is sufficient if the court instruct the jury that if they believe the indebtedness recovered to be *bona fide* the plaintiff is entitled to recover. *Id.*

RESIDENCE.

1. If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period. *Bradstreet vs. Bradstreet*, 229.
2. A residence out of the domicile of origin repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it. *Id.*
3. Where a person lives is taken *prima facie* to be his domicile until other facts establish the contrary. *Id.*
4. On the evidence in this case: *Held*, that the defendant was domiciled in Washington. *Id.*

SALES. See *Fraud*; *Judicial Sales*.

SET-OFF. See *Usury*.

SPECIAL ASSESSMENTS.

1. The second section of the act for the government of the District of Columbia, approved June 20., 1874, prohibits the District Commissioners from making contracts for new street improvements. *McClellan vs. District of Columbia*, 94.
2. The Commissioners had no power to authorize a contractor to improve a street and square not included in his contract made before the approval of said act, "in lieu of similar work" which he was bound to do on a different street and square. *Id.*
3. An "extension" contract containing such authority was void, and no valid special assessment or tax-lien certificate could be based thereon. *Id.*
4. A property owner who, under the permission of the Act of June 19, 1878, made complaint of a special assessment, is not estopped thereby from contesting its legality. *Id.*
5. A void assessment cannot be revised. *Id.*
6. An assessment for street improvements is void when the description of the property is so unintelligible that the court cannot ascertain the premises charged with the assessment. *Windsor vs. District of Columbia*, 96.
7. Where the lots claimed to be assessed are lots 41 and 42 of square 69, and the description is "of 41 and 42," it is unintelligible and void. *Id.*
8. Where an assesment contains charges not authorized by law it is to that extent void. *Id.*
9. So, where the amount intended to be assessed is given in figures only, with no mark to indicate the value represented by the figures, the assesment is void. *Id.*
10. *Bensinger vs. The District*, 6 Mackey, 288, and *Walker vs. The District*, 6 Mackey, 355, *affirmed*. *Id.*
11. The city councils of the city of Washington were deprived of every power over the streets of that city from and after the 25th of April, 1871, the date of the organization of the Board of Public Works. *Bates vs. District of Columbia*, 76.
12. A void assessment for street improvements is not validated by a mere request of the owners of the property to the Board of Public Works to revise the same, the Board never having had any legal connection with such assessment. *Id.*
13. After a special assessment for a street improvement has been paid, the District Commissioners have no power to assess a second time because of a mistake made in the amount of the original assessment. *Danenhower vs. District of Columbia*, 99.
14. Such special assessment is extinguished by payment, even though made by a person who does not own the property assessed. *Id.*

RESIDENCE—Concluded.

15. The act of Congress of June 19, 1878 (20 Stat., 166), authorizes the revision and correction of assessments complained of as "erroneous or excessive," but it confers no authority to impose, voluntarily and in the absence of complaint, another, a different, and a much larger levy. *Id.*
16. A special assessment should be for the street improvement specified in the contract, and for no other. *Schneider vs. District of Columbia*, 252.
17. The power of the District Commissioners to revise special assessments of the Board of Public Works (Act of June 19, 1878), does not include the power to add charges for improvements not named in the original assessment. *Id.*

STALE DEMAND.

Courts of equity discourage a stale demand when the person setting it up has lost his moral right to enforce it. *Gibbons vs. Duley*, 320.

STATUTES.

The following, among others, referred to, commented on or explained in the cases cited :

ACTS OF CONGRESS.

1833. (Mechanic's Lien.) *Monroe vs. Hannan*, 202.
 1874, June 20. (Abolishing Board of Public Works.) *Windsor vs. Ford*, 97.
 1874, June 23. (Terms of Circuit Court.) *Gilbert vs. Morgan*, 297.
 1878, February 28. (Silver Certificates.) *U. S. vs. Eliason*, 107.
 1878, June 14. (Building Regulations.) *U. S. vs. Cole*, 511.
 1878, June 19. (Assessment of Taxes.) *Windsor vs. Ford*, 97.
 1879, February 6. (Marriage of Colored Persons.) *Thomas vs. Holtzman*, 64.
 1879, February 25. (Term of Circuit Court.) *Gilbert vs. Morgan*, 297.
 1879, March 3. (Aliens.) *Geoffroy vs. Riggs*, 337.
 1884. Ch. 143. (Mechanic's Liens.) *Monroe vs. Hannan*, 203.
 1886, August 4. (Silver Certificates.) *U. S. vs. Eliason*, 107.
 1886, August 5. (Potomac River.) *U. S. vs. Morris*, 9.
 1887, March 3. (Aliens.) *Geoffroy vs. Riggs*, 338.

REVISED STATUTES OF THE UNITED STATES.

- SECTION 362. (District Attorneys.) *U. S. vs. Cole*, 511.
 490. (Patents.) *U. S. ex rel. Pollok vs. Hall*, 17.
 491. " " "
 493. " " "
 771. (Civil Actions.) *U. S. vs. Cole*, 511.
 858. (Suits by and against Administrators.) *Andrews vs. Hunt*, 311.

STATUTES—Concluded.

892. (Patents.) U. S. *ex rel.* Pollok *vs.* Hall, 18.
 1818. (Streets of Washington.) U. S. *vs.* Cole, 511.
 3619. (License Tax.) Hill *vs.* District of Columbia, 487.
 4894. (Patents.) U. S. *ex rel.* Pollok *vs.* Hall, 18.
 5467. (Violation of Postal Laws.) U. S. *vs.* Eliason, 105.

REVISED STATUTES OF THE DISTRICT OF COLUMBIA.

1857. CH. 20. (Mechanic's Liens.) Monroe *vs.* Hannan, 203.
 SEC. 92. (Laws of Maryland Continued in Force.) Reynolds *vs.* Smith, 29.
 226. (Streets of Washington.) U. S. *vs.* Cole, 511.
 716. (Usury.) Kleindienst *vs.* Johnson, 356.
 760. (Jurisdiction Sup. Ct. D. C.) Reynolds *vs.* Smith, 29.
 803. (Appeals.) Jones *vs.* Railroad Co., 432.
 804. " " "
 805. " " "
 806. (New Trials.) " 432.
 839. (Witness Fees in Criminal Cases.) District of Columbia *vs.* Lyon, 222.
 904. (Duties of District Attorney.) U. S. *vs.* Cole, 511.
 918. (Practice of Courts.) Reynolds *vs.* Smith, 29.

ACTS OF MARYLAND.

1715. Ch. 23, Sec. 6. (Limitations.) Gibbons *vs.* Duley, 320.
 1715. Ch. 40, Sec. 7. (Attachment.) Reynolds *vs.* Smith, 29.
 1715. (Marriage.) Thomas *vs.* Holtzman, 63.
 1717. " " "
 1777. Ch. 12. (Marriage.) Thomas *vs.* Holtzman, 63.
 1780. Ch. 8. (Relations with France.) Geoffroy *vs.* Riggs, 336.
 1785. Ch. 72, Sec. 25. (Equity Practice.) Reynolds *vs.* Smith, 29.
 1786. (Descents.) Geoffroy *vs.* Riggs, 338.
 1791. (Cession of District of Columbia Aliens.) Geoffroy *vs.* Riggs, 337.
 1791. Ch. 45. (Mechanic's Liens.) Monroe *vs.* Hannan, 202.
 1798. Ch. 101, Subch. 5, Secs. 3, 4. (Administration.) Edwards *vs.* Maupin, 54.
 1798. Ch. 101, Subch. 5, Sec. 6. (Administration.) Estate of Patten, 392.

STATUTES, CONSTRUCTION OF.

1. In the absence of an express repeal a later statute may be held to have worked a constructive repeal of an earlier one. Gilbert *vs.* Morgan, 296.

STATUTES, CONSTRUCTION OF—Concluded.

2. This may happen in two classes of cases; first, where it plainly appears, upon a comparison of the old and new legislation, that it was the intention of the legislature to take up *de novo* the whole of the subject to which it related, and to make in the new statute whatever provision it intended to allow concerning that subject; second, the courts must construe a later statute as intending a repeal of all earlier legislation which they find to be repugnant to it. *Id.*
3. A statute cannot be held to be repealed for repugnancy if the new statute leaves any opportunity for its application. *Id.*
4. The Act of February 25, 1879, providing for the holding of two terms of the Circuit Court, does not interfere with the operation of the Act of June 23, 1874, when only one term of the Circuit Court is being held. *Id.*

STATUTE OF LIMITATIONS. See *Adverse Possession*.

1. The provision of Sec. 18, Subch. 8, of the Statute of Limitations, providing that claims against an executor or administrator shall be prosecuted within nine months, &c., being an exceptional abbreviation of the general Statute of Limitations, should receive a construction almost penal in strictness. *Robeson vs. Niles*, 182.
2. Hence it does not apply to a case where the claim originally rejected is different in form from that sued on; as where the original claim was for a certain sum for services rendered as attorney and trustee, while that sued on is for a less sum and for services as attorney only. *Id.*
3. In equity the Statute of Limitations being regarded rather as one of presumption than of repose, the court will lay hold of any facts in the case which would show it to be inequitable to apply the bar with the same rigor that would prevail in a court of law. *Id.*
4. The Maryland Act of 1715, providing that no bond shall be admitted in evidence against any person after twelve years, &c., does not prohibit the admission of such a bond in evidence in collateral controversies. *Gibbons vs. Duley*, 320.
5. Under an agreement to pay a sum of money out of the proceeds of a claim of the promisor against the United States as soon as the same shall be collected, there is no legal obligation on the part of the promisor to make known to the promisee the fact of the collection of the fund, and his failure to do so will not prevent the running of the Statute of Limitations from the date of its collection. *Jackson vs. Combs*, 608.
6. In such a case the rule is that unless by virtue of the contract itself, or some relation of the parties, the defendant is under a

STATUTE OF LIMITATIONS—Concluded.

duty to make known the fact of payment, mere silence amounting to nothing more than non-action is not such a fraud upon the plaintiff as entitles him to complain of it; but it *seems* it would be otherwise if he were guilty of any act the tendency of which would be to deceive the plaintiff. *Id.*

STREET IMPROVEMENTS. See *Special Assessments*.

TAXES. See *Special Assessments*.

TRESPASS. See *Practice* (at law), 4.

TRUSTEES. See *Deed*, 1-4; *Ejectment*, 1; *Marriage Settlements*; *Wills*, 6, 7.

1. A testator may direct that the same discretionary power which he has given to trustees designated by himself shall belong to the trustee appointed by the court in case of a vacancy; but if he omits to do so, a discretionary power will be construed to be personal. *Edwards vs. Maupin*, 39.
2. Where a sale has been made by a trustee appointed by the court, all parties interested in the estate are entitled to a hearing before the sale is finally ratified. *Id.*
3. Where a purchaser at a trustee's sale having been notified of proceedings being taken to vacate the sale, voluntarily permits such proceedings to go on to a final decree without his intervention, it will be too late to come in after such decree has been affirmed. *Id.*
4. Where, by a will, a trust is created and the executor is directed to sell the property for the purpose of carrying out the trust, the power of sale survives him, and the court will appoint a trustee to make the sale and execute the trust. The Maryland Act of 1785 gives to this court ample jurisdiction in such a case. *Marshall vs. Wheeler*, 414.
5. Misappropriation by the trustee of the proceeds of a sale, made under direction of the court, will not invalidate the sale, unless it was done under a previous plan to defraud, and in which the purchasers participated or of which they had notice prior to the purchase. *Id.*

USURY.

Although premiums paid for moneys advanced to borrowers by a building association be usurious, yet the statute (Sec. 716, R. S. D. C.) confers no authority on the court, on an accounting between the parties, to set off against the principal debt the sums so paid. *Kleindienst vs. Johnson*, 356.

WILLS. See *New Trials*, 14; *Trustees*, 1, 5, 6.

1. Under the Married Woman's Act of this District a wife is capacitated to make a will without the consent of her husband; what

WILLS—Concluded.

- the will is to operate upon is another question, and one which the Orphans' Court has no jurisdiction to pass upon; its power extends only to inquiries into the matters which relate to the probate, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument. *Emmons vs. Garnett*, 52.
2. When the probate is granted, and not before, the authority to determine what passes under the will is devolved upon the courts of law and equity. *Id.*
 3. The fact that the husband does not object to the probate of a will executed by his wife does not, since the passage of the Married Woman's Act, estop him from afterward raising the question as to what property passed by the will. *Id.*
 4. Where a caveat has been filed to the probate of a will and issues have been framed to be sent to the Circuit Court for the trial, it is error for the Orphans' Court to direct who shall stand upon the record as plaintiff and who as defendant; that duty belongs to the Circuit Court. *Id.*
 5. While this court does not lay down the rule as absolute in all cases that the caveator shall be plaintiff and the caveatee defendant, yet, as a general rule, it is the proper mode of procedure for the caveator to open and close to the jury. *Id.*
 6. Where in a will a trust is created and no person is named to perform the trust, the executor will be charged with its performance, if upon the whole will such appears to have been the intention of the testator. *Mitchell vs. Thompson*, 130.
 7. Where a testator makes his debtor executor of his will and directs the money due from him to be invested in land for the use of another, the executor will be charged with the duty of making the investment if no other person is named. *Id.*
 8. Where a debtor is appointed executor of his deceased creditor the debt at once becomes cash assets in his hands; if the debt is not yet due it becomes assets as soon as it matures. *Id.*

Ex. J. M.

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